United Kingdom

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Mr Hendy is right, however, to draw attention to the United Kingdom's international obligations to recognise the right to strike contained in a number of instruments, including the Freedom of Association and Protection of the Right to Organise Convention (No. 87) of the International Labour Organisation, which the UK was one of the first member states to ratify, in 1949. Sooner or later, the extent to which the current statutory regime is in compliance with those international obligations and with relevantinternational jurisprudence will fall to be carefully reconsidered.[1]

1. Introduction

According to Lord Justice Maurice Kay in a recent decision of the Court of Appeal, the right to strike in the United Kingdom is not much more than a slogan.[2] This extraordinary statement was made in a case in which Unite the Union was restrained by an injunction from taking industrial action during a campaign to establish collective bargaining machinery for London bus drivers. Although supported in a ballot of the workers in question, the action was stopped in the courts for a number of reasons, including an alleged failure on the union's part to give proper notice to the employer of its intention to ballot for industrial action. The union had provided information about the number and categories of workers to be balloted, but had failed to explain, in the case of some workers, how the numbers had been calculated.[3] The union also faltered on the ground that it had failed to notify the employer as soon as reasonably

practicable after the ballot result had been declared.
The ballot result in favour of industrial action had been declared at noon on 1 September 2008, but not communicated to the union office until the following day (the 2nd), and not to the general secretary until the day after that (the 3rd) – at which point the employer was told. Not good enough, said the Court of Appeal. The Act says that the information must be communicated not as soon as reasonable, but as soon as reasonably practicable after the ballot result is declared.[4] The union was tripped up by this «hard temporal burden».[5]
Welcome to the world of pedantry, the thread that binds the tight legal restrictions on the freedom of trade unions to exercise what is recognised by international human rights instruments as a fundamental human right, and which in many countries is protected by constitutional law. *Metrobus* is perhaps the first in a rash of recent decisions caused by a virus now affecting employment relations, in which employers are rushing off to the courts at the advice of corporate lawyers, apparently oblivious to their professional duty to prmote human rights.
The *Metrobus* decision was all the more remarkable for the fact that the employer had the opportunity to find out about the irregularities before the strike had started, and indeed had allowed one period of industrial action to proceed before pouncing in the courts for an injunction to stop a second period of action, on the basis of alleged irregularities (some of which were said to have taken place even before the ballot was held).
The fact that the employer either knew, or had the means to know, about these irregularities at that stage – and thus had the means to do something about them and avoid the union running up large costs – was irrelevant. So much for the idea that he who comes to equity must do so with clean hands.

2. No Right to Strike in the United Kingdom

It is well known that there is no right to strike in the United Kingdom. It did not need the Court of Appeal in the *Metrobus* case to remind us that the right to strike is simply a legal metaphor.[6] In a more recent decision of the same court, it was explained that a strike by workers (for whatever reason) will typically constitute a breach of contract by the workers involved and give rise to liability on the part of the union for inducing the workers to break their contracts of employment.[7]
The consequence of this liability is that, at common law, industrial action may be restrained by an injunction in proceedings brought by the employer, who may also be able to recover damages for losses covered. These common law liabilities
have evolved in relation to trade union action since the late 19th century, as the courts invented new heads of civil liability to restrain industrial action after criminal liabilities and sanctions had been lifted by Parliament.
Indeed one of these cases – the *Taff Vale Railway* case – is often credited as being responsible for the formation of the Labour Party,8 as the trade unions sought means to overrule a decision that established liability in damages for

losses suffered by an employer as a result of industrial action. The reversal of that decision was secured by the Trade Disputes Act 1906. Described by Keir Hardie at the time as organised labour's Magna Carta, the 1906 Act falls some way short of that mark, but it did establish a legal form for the protection of the freedom to strike that continues to this day.

Thus, rather than give trade unions and their members a right to strike, the 1906 Act provided an immunity to trade unions and their officials for certain acts that would otherwise be unlawful (such as inducing breach of a contract of employment), provided the action was done «in contemplation or furtherance of a trade dispute», as defined in the Act.[9] The Act also gave trade union funds an almost complete protection, in the sense that a trade union could not be sued by an employer seeking to recover losses sustained in the course of a dispute.[10] This would be important where the action of the union fell outside the scope of the immunity (i.e. as not being in contemplation or furtherance of a trade dispute, as defined by the Act).

This method of protecting the freedom to strike (in the form of an immunity rather than a right) continues to this day. The current law was introduced in its present form by a Labour government in 1974 (which also eschewed the principle of rights) and was heavily amended and qualified by the Thatcher government before being consolidated in the Trade Union and Labour Relations (Consolidation) Act 1992.[11] The latter was subsequently amended by the Major government in 1993, and to a limited (and largely unhelpful) extent by the Blair government in 1999 and 2004.

With all its modifications, the 1992 Act thus retains a limited immunity from liability for acts done in contemplation or furtherance of a trade dispute, though the latter term has also been amended and narrowed so that the immunity applies only to disputes involving workers and their own employer.[12] So in a recent case involving the NUJ there is no protection where the trade union took action against the corporate holding company which made the decisions subsequently implemented by the subsidiary companies which formally employed the journalists.[13]

Over the years, the immunity has been (i) withdrawn from certain forms of action which was once protected, such as secondary or solidarity action,[14] and (ii) made conditional on certain procedural obligations being met before the action is taken.[15] The latter include the duty to conduct a secret postal ballot of the workers to take part in the industrial action, and the duty to give various sorts of notice to the employer and to the members of the union. It is these notice provisions which have given rise to such difficulty for trade unions in recent cases, the unions now being required to (i) inform the employer that it intends to conduct an industrial action ballot at least seven days before the ballot opens;[16] (ii) provide the employer with a copy of the ballot paper at least three days before the ballot takes place;[17] (iii) inform the employer of the ballot result (as soon as reasonably practicable) after the ballot takes place;[18] (iv) inform the members of the union of the ballot result (again as soon as reasonably practicable after the ballot takes place);[19] and (v) inform the employer of the intention to strike (at least seven days in advance), and indicate whether the action is to be continuous or discontinuous.[20]

3. Right to Strike and Convention Rights

Article 11 of the ECHR protects the right to freedom of association, stating that «Everyone has the right to freedom of peaceful assembly and association, including the right to form and join trade unions for the protection of his interests ». Article 11(2) then qualifies this right in the usual way, by allowing a number of restrictions where these are prescribed by law and necessary in a democratic society for the protection of a wide range of interests, including the rights and freedoms of others. The rights and freedoms of others would include the interests of employers – interests which we might expect to be lapped up by the English courts. Indeed the Court of Appeal has not only done so, but it has also discovered a Convention-protected right for this purpose in the shape of the right to private property in the first protocol to the Convention.[21]

3.1 New Approach in the European Court of Human Rights

For many years, article 11 was interpreted narrowly by the European Court of Human Rights, beginning with a line of cases in the 1970s, in which it was held that the right to freedom of association did not imply that trade unions had a right to be consulted, to bargain collectively, or to organise collective action.[22] This narrow approach was justified as being driven by the original intent of the authors of the treaty. While taking a narrow view of the positive right to associate freely, the same court subsequently held that the right to freedom of association also implies a limited right not to associate[23] – the scope of that negative right being extended in subsequent cases.[24] This latter development had serious consequences for closed shop practices operating in a number of member states of the Council of Europe, and was taken despite the clear intention of the authors of the treaty that the positive right to associate should not include the negative right not to associate.[25] In these latter cases, the Court's reasoning was thus rooted in a different approach to interpretation, the Court adopting «a living instrument» approach, rather than the «original intent» approach that had influenced the earlier decisions on the right to bargain and the right to strike.

This willingness of the Court to use the Convention to undermine, rather than protect, trade unions fuelled the suspicion of labour lawyers about human rights, which were seen by many as another instrument of labour control rather than labour protection. These suspicions were reinforced by developments in the national courts of a number of countries – notably Canada, Ireland and the United States – which had the doubtful benefit of constitutionally entrenched rights (the content and scope of which relying exclusively on the courts).[26] On 12 November 2008, however, the European Court of Human Rights redeemed itself big time in a decision on article 11, following a complaint from Turkey where the courts had invalidated a collective agreement between a local government employer and a public service trade union. According to the Turkish courts, under Turkish law, trade unions have the right to exist, but have no power to conclude collective agreements. As a result, the union in that case had no remedy under Turkish law when the employer unilaterally repudiated an agreement it had freely entered into. Not only that, but the court ruled that the agreement was void, and that any benefits paid to union members under the agreement had to be returned to the local authority. There is also a suggestion that, in separate proceedings, the officials of the employer who sanctioned the agreement would be personally liable for any losses which might not be recovered.

3.2 Implications of the New Approach

The complaint filed with the Strasbourg court in 1996 eventually led to a decision in favour of the union in 2006, whereupon the Turkish government asked for the matter to be examined by a Grand Chamber of 17 judges. This was a big mistake: the Grand Chamber was not only unanimous in upholding the decision of the third section of the Court, but did so in a way that cast aside the old jurisprudence, announcing that article 11 is now to be read very widely to include the right to bargain collectively.[27] In taking this bold step, the Court explained its new approach as being necessary to keep pace with changing developments – referring in particular to the international labour standards that protect the right to bargain collectively, the provisions of the Council of Europe's Social Charter and the EU's Charter of Fundamental Rights, as well as the law and practice of other member states of the Council of Europe. But not only did the court hold that the right to bargain collectively must now be read into article 11 – in doing so it suggested that the substance of the right must meet the minimum standards set by ILO Convention 98,[28] and that any restrictions or qualifications on that right will be permissible only if they are also permissible under ILO Convention 98.

Having thus held that the right to bargain collectively was now protected by article 11, it was a short step to hold that the right to engage in collective action was protected as well. In a subsequent case, the court found that there had been a violation of article 11 in circumstances where the Prime Minister's department in Turkey had prohibited a one-day strike by civil servants. Informed by the decision in *Demir and Baykara* (as well as by international labour convention and the Council of Europe's Social Charter), this case was significant for recognising that the right to strike is a right of the union, and that the union can make a complaint where a strike has been banned. In subsequent cases, the Court has underlined the view that the right to strike is now covered by article 11, but in doing so has upheld claims from trade union members who claimed to have been the victim of hostile action by the State or by their own employer. The right to strike is thus the right of the union and of individual workers, and the Convention is violated by bans on the exercise of the right to strike and by penalties on workers, which include criminal sanctions, discrimination in the allocation of work or selection for redundancy, and disciplinary action. What is less clear from this evolving body of case law, however, is the precise scope of the right to strike. To what forms of industrial action does it apply, and what permissible limits may be imposed by the State?[29]

4. Right to Strike and International Standards

So what are the international standards to which the Strasbourg court referred? There are now several international treaties respecting trade union rights (to organise, to bargain and to strike), including the International Covenant on Economic, Social and Cultural Rights of 1966. The latter, however, was not relied on by the Court, which has been concerned more with the conventions of the International Labour Organisation – a UN agency based in Geneva, established as part of the Treaty of Versailles in 1919. ILO Conventions are treaties under international law, and are binding on those states that ratify them. So far as trade union rights are concerned, these are drawn not only from the ILO Constitution but can also be found in ILO Conventions 87 and 98, which deal with freedom of association (a term which has been said by the bodies responsible for supervising the operation of the Conventions to include the right to strike).[30] The Strasbourg Court has been concerned also with the Social Charter of the Council of Europe. Issued originally in 1961, and revised in 1996, the Charter deals with a wide range of social rights, but at its core are trade union rights: the right to organise, bargain and strike (articles 5 and 6). Indeed in the preamble to the Revised Social Charter reference is made to «the indivisible nature of all human rights, be they civil, political, economic, social or cultural».

4.1 The ILO

So far as the ILO is concerned, the United Kingdom has been found in breach of treaty obligations in every cycle of supervision by the Committee of Experts since 1989. The Committee of Experts is a body of international jurists whose members include British High Court judge, Mrs Justice Cox (and whose members in the past have included Earl Warren before he became Chief Justice of the US Supreme Court, and Archibald Cox before he became Richard Nixon's nemesis). In 1989, the Committee's seminal report on the United Kingdom said that, generally

The Committee has always considered that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests as guaranteed by articles 3, 8 and 10 of the Convention (General Survey, paragraph 200). It has also taken the view that restrictions relating to the objectives of a strike and to the methods used should be sufficiently reasonable as not to result in practice in an excessive limitation of the exercise of the right to strike (General Survey, paragraph 226. See also paragraphs 218-220).[31]

Apart from emphasizing the need for protection against common law liability and criticizing the restrictions on solidarity and sympathy action, the Committee also said that the fact that the definition now refers only to disputes between workers and «their» employer could make it impossible for unions to take effective action in situations where the «real» employer with whom they were in dispute was able to take refuge behind one or more subsidiary companies who were technically the «employer» of the workers concerned, but who lacked the capacity to take decisions which are capable of satisfactorily resolving the dispute.[32]

As regular as clockwork, the Committee has repeated its criticisms of the UK in relation to the right to strike (as well as on other grounds) almost every two years.[33] In its most recent reports, however, the Committee has had to address a fresh concern: namely, the implications in UK law of the European Court of Justice decision in the infamous *Viking* case. The ECJ in *Viking* held that industrial action interfering with the freedom of business to move freely between member states was unlawful under the EC Treaty, giving rise to the possibility of unlimited damages against a trade union.[34] This led in 2009 to threats being issued by BA in a dispute involving the airline pilots' union BALPA that if a proposed strike went ahead the company would seek to recover damages for losses alleged to be in the region of £100 million a day, even though the strike was lawful under English law.[35] Following a complaint to the ILO, the Committee of Experts was appalled by these developments and took the view that the doctrine that was being «articulated in these ECJ judgments is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention [87]».[36] The Committee concluded that

In light of the observations that it has been making for many years concerning the need to ensure fuller protection of the right of workers to exercise legitimate industrial action in practice, and bearing in mind the new challenges to this protection as analysed above, the Committee requests the Government to review the [domestic law] and consider appropriate measures for the protection of workers and their organizations to engage in industrial action and to indicate the steps taken in this regard.[37]

4.2 Council of Europe's Social Charter

It is not only the ILO. Similar problems have arisen under the Social Charter, as revealed by the most recent report of the Social Rights Committee, the body of jurists responsible for the supervision of the Charter. On 16 December 2010, the Committee reported its conclusions on the United Kingdom's compliance with the so-called labour provisions of the Charter. Here we find that, out of the 13 provisions examined by the Committee, the United Kingdom was in breach of no fewer than ten, and conforming with only three of the obligations examined.[38] The measures in questions related to the right to just conditions of work, the right to fair remuneration, the right to organise, the right to bargain collectively, and the right to strike. So far as the right to strike is concerned, it was found that the violations existed not for one but for multiple reasons.

Like the ILO, the Committee also repeated a number of conclusions that it has been making for many years now. These included criticisms of restrictions on the parties against whom industrial action may be taken, as well as on the subject-matter of disputes:

In its previous conclusions (Conclusions XVII-1, Conclusions XVII-1) the Committee found that lawful collective action was limited to disputes between workers and their employer, thus preventing a union from taking action against the de facto employer if this was not the immediate employer. It furthermore noted that British courts excluded collective action concerning a future employer and future terms and conditions of employment in the context of a transfer of part of a business (University College London NHS Trust v UNISON). The Committee therefore considered that the scope for workers to defend their interests through lawful collective action was excessively circumscribed in the United Kingdom. Given that there have been no changes to the situation, the Committee reiterates its finding that the situation is not in conformity with article 6§4 of the Charter in this respect.[39]

Otherwise, the Committee addressed two other concerns about the position of the United Kingdom, the first of which was germane to the granting of injunctions to employers in recent trade disputes. Thus, The Committee considered in its previous conclusions (Conclusions XVII-1, XVIII-1) that the requirement to give notice to an employer of a ballot on industrial action, in addition to the strike notice that must be issued before taking action, is excessive (even the simplified requirements introduced by the Employment Relations Act (ERA) 2004). As there have been no changes to the situation, the Committee reiterates its finding that the situation is not in conformity with article 6§4 of the Charter in this respect.[40]

The other issue addressed by the Committee related to consequences of industrial action – the Committee again concerned about the inadequate protection for workers who take part in lawful strike action. Although it is no longer the case that workers dismissed for taking part in a lawful strike are without a remedy for dismissal, the Committee was nevertheless unimpressed by the fact that the protection against dismissal is not guaranteed after the first 12 weeks of the dispute.[41] The Committee found «the period of twelve weeks beyond which those concerned lost their employment protection to be arbitrary»,[42] and despite fresh arguments from the government, reiterated its conclusion of the UK's non-conformity, given that the legal position had not changed since its last report. In a comprehensive report, the Committee thus concluded that the situation in the United Kingdom is not in conformity with article 6 § 4 of the Charter on the following grounds:

- the scope for workers to defend their interests through lawful collective action is excessively circumscribed;
- the requirement to give notice to an employer of a ballot on industrial action, in addition to the strike notice that must be issued before taking action, is excessive;
- the protection of workers against dismissal when taking industrial action is insufficient.[43]

5. Back to the Right to Strike in the United Kingdom

It is in this context of rising international standards on the right to strike that we return to the United Kingdom. The starting point is the law set down in the early Victorian era. As we have seen, trade unions rely on an immunity provided by Parliament for the freedom to engage in industrial action (they have no right to do so); but the immunity applies only – in the words of the statute – to «acts done in contemplation or furtherance of a trade dispute».[44] As we have also seen, since 1984 this limited immunity has been subject to the condition that the union conducts a secret postal ballot of its members and, since 1993 that the union complies with a number of onerous notice requirements before embarking upon industrial action. As already pointed out, it is these latter provisions that have been responsible for the rash of recent injunctions to stop industrial action, despite the fact that the industrial action concerned was in furtherance of a trade dispute and fully-supported by a ballot (sometimes with overwhelming votes in favour, on turnouts that would make politicians green with envy).

5.1 De-Railing the RMT

The notice requirements are extremely detailed and seem designed disingenuously to ban the right to strike by erecting procedural barriers which are impossible to climb. Thus, under the first of the three main notice requirements, the union must notify the employer of its intention to hold a ballot for industrial action. The notice must contain information about the categories of workers who are to be included in the ballot, as well as information about the workplaces of the workers to be balloted. In *EDF Energy Ltd v RMT*[45] the union gave notice of its intention to ballot 52 «engineers/technicians» in the course of a dispute about pay, this categorisation of the workers being in accordance with the information held in the union's records. According to the High Court, this was insufficient information; the union should have complied with the employer's request to be supplied with information which would identify the «fitters, jointers, test room inspectors, day testers, shift testers or OLBI fitters». This is despite the fact that the legislation simply requires the employer to supply such information as the union has in its possession – the union being told in this case that it should have asked its shop stewards to provide the additional information required by the employer. According to Mr Justice Blake (in decision upheld by the Court of Appeal),[46] the information given by the union was insufficient; it should have contacted shop stewards to «obtain the particular functions in which each employee was engaged». This is despite the fact that the law only requires the union to provide information that it has in its possession, and despite the fact that the law requires the union to inform the employer of the categories, rather than the functions, performed by the workers concerned.

The *EDF Energy* case was followed by *Network Rail Infrastructure Ltd v RMT*,[47] in which the union gave notice of its intention to ballot members in a dispute about health and safety on the railways. In its notice of intention to ballot, the union provided inaccurate information about the places of employment of some of its members, rather than incomplete information about their «category». In this case, some of the workplaces listed did not exist, while others had no union members. In addition, the union was unaware of the workplaces of some of the workers to be balloted – in which case it said «workplace unknown». The nature of the industry is such that it is difficult for the union to maintain up-to-date records, but in this case there was clear evidence that the union had nevertheless gone to considerable lengths to comply with the legislation. These efforts were overlooked, the union being chastised by the court for failing to make use of information provided by the employer in 2008, relying instead on information which it had sought from the employer for the purposes of the ballot in 2009. The fact that it had relied on the more recent information provided by the employer did not «excuse the failure to take obvious and simple steps which were available to it to check the information it had»,[48] even though the more recent information might be thought to have displaced the earlier data.[49]

5.2 Grounding Cabin Crew

RMT has not been the only victim of this litigation, with Unite also falling under the sword wielded by the courts – in cases involving Metrobus, British Airways and Milford Haven Port Authority. The courts were pulled into the BA dispute on two occasions. On the first, the union had balloted its members for industrial action in relation to a dispute about crew levels on certain flights. The ballot led to an overwhelming 92.49% voting in favour of industrial action on a turnout of 80%. Nevertheless, the High Court granted an injunction on the ground that the union had given incorrect information about the number of people who were to be balloted and inaccurate information about the number of people who would be taking industrial action.[50] (In addition to the lists of the categories and workplaces of those involved, the union must provide information on the numbers in each category and at each workplace, as well as the total numbers of those likely to be involved.)[51] Here the information provided by the union included details of an unknown number of people the employer claimed (but did not establish) were likely to take voluntary redundancy and so were unlikely to take part in the proposed industrial action. This is despite the fact that there were only 1,003 such people out of a voting constituency of 10,286 employees, of whom 9,514 voted in the ballot. Even if all 1,003 had voted against the action, their participation would not have affected the outcome of the ballot.

The granting of the injunction on 17 December 2009 led to the holding of a second ballot – said in the Court of Appeal to have been «impeccably conducted » – in which 9,282 people voted (representing 79.39% of those eligible to vote).[52] Again, the majority in favour of industrial action was massive, with 7,482 in favour and 1,789 against. Here, however, the union was tripped up not because of the ballot or the industrial action notice it had given to the employers, but because of the notice of the ballot result it gave to its members. In this case, an injunction was granted by the High Court in a legal argument relating in part to the way in which the union informed its members (on the website and by text), and to the question of whether all members had been notified of the 11 spoiled ballot papers. Again, neither the method of communication nor the information provided, affected in any way the fact that this was a ballot that had produced an overwhelming majority in favour of industrial action. Nor was there any evidence that any members of the union had not been made aware of the ballot result or that they were concerned about the manner of its communication. Nevertheless, it was only the intervention of the Court of Appeal (albeit in a tense 2:1 thriller) reversing the High Court that prevented the legal system from plumbing the depths of insanity – the Lord Chief Justice questioning whether as a matter of principle it can be appropriate that even a complete failure to inform the Union members – not the employers – of the fact that an infinitesimal proportion of spoilt ballots were returned which could have had no possible bearing on the outcome of the ballot could leave the Union liable in tort for calling a strike which had the support of the vast preponderance of its members. At the risk of repetition, it does indeed seem curious to me that the employers can rely on a provision designed to protect the interests of members of the Union in order to circumvent their wishes.[53]

6. The Human Rights Act

Since the *Metrobus* decision on 31 July 2009, there have been at least eight cases where unions have been restrained by the High Court from taking industrial action.[54] In five of these cases it has been necessary for the unions to appeal to the Court of Appeal,[55] and in four of these cases,[56] the union has succeeded, as the Court of Appeal has gradually wearied of the technical nonsense whereby injunctions are granted by trigger-happy High Court judges to restrain the exercise of a fundamental human right – High Court judges such as Mr Justice Blake, Mrs Justice Cox, Mr Justice McCombe, Mr Justice Sweeney, Mr Justice Ramsey, Mr Justice Tugendhat, and Mrs Justice Sharp. But although the Court of Appeal has, in these ways, stopped some of the more fanciful arguments by employers' legal teams, it has not stopped them all. Nor does it mean that trade unions do not suffer adverse consequences, even in those cases where they win. In the *Milford Haven* case, for example, the union re-balloted rather than wait for the forensic lottery to run its course.[57] More to the point, however, why is all this even happening? After all, this is the era of the Human Rights Act, in which the European Court of Human Rights has said that Convention rights include the right to strike, and in which the domestic courts are directed by Parliament to have regard to the decisions of the Strasbourg court (with its glorious reference to ILO Conventions and the Social Charter) in the determination of Convention rights?

6.1 Crashing the Metrobus

The answer lies in the blow delivered to trade union rights by the Court of Appeal in *Metrobus* and maintained by the Court of Appeal in all but the most recent of its subsequent decisions. In the *Metrobus* case it had been argued that the restrictive trade union law must now be read consistently with Convention rights, the court's attention being drawn not only to *Demir and Baykara v Turkey*, but also *Enerji Yapi – Yol Sen*,[58] where it was held that the right to freedom of association includes the right to take collective action as well as to engage in collective bargaining. It is true that Lord Justice Lloyd accepted that the latter was «a decision to the effect that action to prevent participation in a strike, or to impose sanctions for such participation is an interference with the right to freedom of association under article 11, for which justification has to be shown in accordance with article 11 paragraph 2».[59] But pouring cold water on the idea that the right to strike might thereby be protected in English law, he continued by saying 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 does not seem to me that it would 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 recognizing a right to take industrial action as an essential element in the rights afforded by article 11.[60]

The attention of the Court of Appeal was also directed to ILO Conventions in which the right to strike is recognized (notably Convention 87), as well as the Council of Europe's Social Charter of 1961. It is true that these instruments have not been incorporated into English law and that, as international treaties, they cannot be enforced in the domestic courts. The point here, however, is that this material (including the jurisprudence of the supervisory bodies of the ILO and the Council of Europe) was relied upon by the European Court of Human Rights not only to justify reading the right to freedom of association widely to include the right to bargain and the right to strike, but also to inform the substance and content of these rights. But according to Lord Justice Lloyd:

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.[61]

6.2 Stalling in the Court of Appeal

The effect of this blinkered reasoning was that developments under the Human Rights Act stalled while employers were racing to the High Court for their injunctions to stop strike action, sometimes for the most feeble and trivial reasons. The impact of *Metrobus* was soon to be seen in the *EDF Energy* case, where Convention rights were considered at first instance but dismissed by Mr Justice Blake.[62] The latter was bound by *Metrobus*, dismissing arguments based on Convention rights simply on the ground that:

In *Metrobus* as the court concluded that the requirements as to pre-strike notification and ballots were not onerous or oppressive and did not unduly restrict the exercise of the right to strike.[63] I would accept for present purposes Mr Hendy's submission 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 requirements being imposed upon the union that might otherwise be said to interfere with the right. It may also in appropriate cases be relevant to discretion whether any failure by the Defendant is merely a technical one and has no material impact upon the employer's ability to make use of the information. But for reasons that follow, in my judgment, neither consideration requires further exploration on the facts of this case.[64]

Convention rights were raised before Mrs Justice Cox in the first *British Airways* case, but she too was bound by *Metrobus* to conclude that «the statutory requirements relating to ballots and strike notification Part V of the 1992 Act do not unduly restrict the exercise of the right to strike; that the legislation has been carefully adapted over many years, in order to balance the interests of employers, unions and members of the public; and that its provisions are proportionate».65 Similar noises were made in *Network Rail Infrastructure*, where Mrs Justice Sharp thought it important to note that «*Metrobus* establishes these requirements are proportionate and compliant with the European Convention on Human Rights».[66]

While Convention rights were thus being ignored by the High Court (as they were bound to do in the light of Court of Appeal authority), the *EDF Energy* case provided an opportunity to revisit this question and for a differently constituted Court of Appeal to do better second time around. But again the court fluffed its lines. John Hendy QC, representing the union, invited the court to re-open the matter, on the ground that «the *Metrobus* decision, very recent decision as it is, has not had the opportunity of fully taking into account a small number of further Strasbourg decisions».67 But in rejecting this opportunity to revisit the matter, Lord Justice Rix said that «none of those decisions in any way shows that *Metrobus* is clearly to be set aside on the basis of Strasbourg jurisprudence», while he was also to have regard to House of Lords jurisprudence that «precedent must be given effect even in the context of ECHR disputes». So what about the possibility of punting this into the Supreme Court to test Mr Hendy's «bald submission» that «*Metrobus* was wrongly decided»?68 No chance of that either, in view of the fact that the dispute «has now happily been settled» so that the matter was now «academic».69 So the matter lay until March 2011, not being revisited in either the *Milford Haven Port Authority* or the *British Airways* (No. 2) cases, since the injunctions were lifted in both these cases without the need to rely on Convention rights.

The injunction in *Milford Haven* was in fact the low point in what has been a long decline into absurdity. In giving notice of its intention to take industrial action, the union is required to say whether its industrial action will be continuous or discontinuous.[70] In *Milford Haven* the union gave notice that it planned to take both continuous and discontinuous action. Fine, said Mr Justice Sweeney. But the notice should have been on two separate sheets of paper.[71]

7. Fresh Approach to Convention Rights

If the High Court in the *Milford Haven Port Authority* case plumbed new depths in the historic conflict between workers, trade unions and the courts, the decision of the Court of Appeal in *RMT v Serco Ltd* and *ASLEF v London and Birmingham Railway Ltd* scaled new heights.[72] The latter is a historic decision in which the Court of Appeal finally recognises not only the defects of English common law which «confers no right to strike in this country»,[73] but also the importance of «various international instruments», in which these rights are openly acknowledged.[74] Not only that, but the court has at long last further acknowledged that the European Court of Human Rights in Strasbourg «has in a number of cases confirmed that the right to strike is conferred as an element of the right to freedom of association conferred by article 11(1) of the European Convention on Human Rights».[75] This «recognition of a right to strike» means that the anti-union laws are not to be strictly applied against trade unions, the courts no longer to start from the presunption that Parliament intended that the interests of employers always to hold sway.[76]

An injunction was granted against ASLEF in this case, first because the union had inadvertently included in the ballot two members who were not entitled to vote. This was a genuine mistake, openly acknowledged by the union; but it did not affect the result of the ballot. As reported by the Court of Appeal, ballot papers had been sent to 605 drivers. Of the 472 who voted (a turnout of 78%), 410 (87%) voted in favour of industrial action. The accidental inclusion of the two members not entitled to vote was said by the appeal court to be trivial and therefore excusable. A second ground for the injunction was that the union had provided inaccurate information in the notice of their intention to hold a strike ballot. Unbelievable though it may seem, the notice was said to be inaccurate for including the two disputed members. At the prompting of John Hendy QC for both unions, however, the Court of Appeal took a robustly realistic view of the situation, reminding employers everywhere that the duty on the unions under the legislation is simply to provide a notice that is accurate in relation to the information actually held by the union. In other words, the union is not under a duty to go looking for information to satisfy the convenience or whim of the employer, the Court of Appeal's decision in this respect calling into question the validity of the injunctions granted against RMT in earlier cases involving

Network Rail and *EDF Energy*.[77]

A third ground for the injunction was that the union had failed properly to explain to the employer how it had arrived at the information contained in the ballot notice. The union had said that the information was based on union membership records, which had been updated and audited to ensure accuracy. Not good enough, said Mr Charles Bear QC for London Midland. In his view, the union should have disclosed precisely who did what and when, as well as when the records were last updated. And not only that. According to Bear, the notice was fatally flawed for being a «conclusion» rather than an «explanation»,[78] a distinction he had previously persuaded the High Court to accept in the *Network Rail Infrastructure* case, and a good example of the kind of nonsense that the RMT in particular has had to put up with in recent cases. But the Court of Appeal was having none of it, taking the view that «nothing is to be achieved by stating which particular officer obtained the information, or on which particular day, or whether contacts with local officers were by email or phone».[79]

Nor was the court having any of the employer's argument that the union had given an inaccurate explanation by claiming that it had audited its records before giving the information to the employer. In a withering rebuttal of the arguments presented by the employers' legal team, Lord Justice Elias said that:

In assessing the accuracy of the explanation, it must be born in mind that the union officials providing it are not drafting a statute, and nor are they required to use undue precision or accuracy in their use of language. In my view the courts should not take the draconian step of invalidating the ballot, thereby rendering the strike unlawful, simply because the term used to describe a particular process is infelicitous. In my judgment the description of the process undertaken would have to be positively and materially misleading before the explanation could be said to fall short of the statutory requirement.[80]

Having discharged the injunction against ASLEF, the appeal court also discharged the injunction against RMT, and did so for similar reasons. In this comprehensive victory for ASLEF and the RMT, the Court of Appeal stressed that the freedom to take industrial action was not to be constrained by ridiculous arguments invented by lawyers. Nor was it the role of the court to «set traps and hurdles for the union which have no legitimate purpose or function».[81]

True, many of the other traps and hurdles of the anti-union legislation remain. Nevertheless, the confidence of employer legal teams will have taken a real battering from this decision, with big companies no longer in a position to let lawyers take control of their employment relations. The pendulum is swinging in other ways too: these cases establish the duty of the courts to take into account the unions' right to strike in international law, when applying or interpreting the statutory ballot notice provisions, and the nature and scope of the obligations they impose. The next step will be to have the ballot notice provisions removed altogether. The obligation to require a ballot notice at all is in breach of the right to strike guarantees in the European Social Charter, and the attempt to have them removed completely is the subject of an important RMT challenge in the European Court of Human Rights, which is also looking at the total ban on all forms of solidarity action in English law.

8. Conclusion

RMT v Serco Ltd and ASLEF v London and Birmingham Railway Ltd represent a seismic shift in English law, and mean that trade union action will not be quite so easily restrained in the future. Returning to Mr Justice Maurice Kaye, no longer can it said that in English law the right to strike is no more than a metaphor or a slogan. On the contrary, «the ECHR has in a number of cases confirmed that the right to strike is conferred as the right to freedom of association conferred by article 11(1) of the European Convention on Human Rights which in turn is given effect by the Human Rights Act». As Lord Justice Elias pointed out, however, «the right is not unlimited and may be justifiably restricted under article 11(2)».[82] In *Metrobus*, the current statutory restrictions in their full glory were found not to constitute a breach of article 11, having regard to article 11(2). Although the point was made in the two most recent Court of Appeal cases by John Hendy QC for the unions that 174the detailed complexity of the balloting provisions, and their unnecessary intrusion into the union's processes, involves a disproportionate interference with the article 11(1) right175,[83] it was not pressed on the ground that so far as the Court of Appeal was concerned, the questions had been answered by *Metrobus*.

So although the most recent decision of the Court of Appeal has (i) acknowledged a right to strike from Convention rights via the Human Rights Act, (ii) instructed the High Court that it must not start from the presumption in injunction proceedings that the law has to be construed against trade unions, and (iii) probably removed some of the «traps and hurdles» set by the courts beyond those erected by Parliament, it has yet (iv) to succeed in removing any of the major obstacles to the right to strike built up in legislation in the years since 1980, whereby British labour law became the most restrictive in Europe. That is a battle that will now have to be fought in the Supreme Court or in the European Court of Human Rights. So despite *RMT v Serco Ltd and ASLEF v London and Birmingham Railway Ltd*, *Metrobus* still governs in substance. Although it may no longer be true to say as a matter of *principle* that the right to strike is no more than a slogan, it remains an altogether different matter in *practice*. *Serco* represents the attempt by a well-informed court (two of its members are past presidents of the Employment Appeal Tribunal) to regain some ground from the much less well-informed court that sat in *Metrobus* (none of its members had the same specialist knowledge or experience), which seemed determined to ensure that the right to strike should be lost even as a slogan.

Without diminishing the significance of the most recent decisions of the Court of Appeal, *Metrobus* and the body of cases that followed in its wake reveal a number of uncomfortable truths about trade union freedom and human rights in British law. It is because of the common law (law made by judges who have choices) that industrial action is unlawful, yet it is to the same judges that we must now appeal to interpret the statutory immunity from common law liability purposively. The right to freedom of association in the ECHR, which is supposedly enforceable in English law, includes a right to strike in accordance with international human rights standards. Yet our courts stubbornly refuse to comply with the obligations imposed upon them by Parliament. The Human Rights Act has thus made no impact on the substance of the law that has been condemned by international human rights agencies since 1989, though it has helped at least one Court of Appeal to stop the imposition of additional judicial burdens on trade unions. While this is not to be diminished, it remains the case that the introduction of a right to strike in the United Kingdom will not come as a result of the Human Rights Act but as a result of pressure on the government from the Strasbourg court.

Notes

1 [2009] EWHC 3541 (QB), para 27. See R. Dukes (2010) 39 ILJ 82.
2 *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829.
3 Trade Union and Labour Relations (Consolidation) Act 1992, ss 226A, 234A.
United Kingdom
4 Ibid., s 231A.
5 Para 120.
6 Para 118 (Kay LJ).
7 *RMT v Serco Ltd; ASLEF v London and Birmingham Railway Ltd* [2011] EWCA Civ 226, para 2. See Ruth Dukes (2011) 40 ILJ 302.
8 *Taff Vale Railway Co Ltd v ASRS* [1901] AC 426.
9 Trade Disputes Act 1906, s 5 for the definition.
10 Ibid., s 4.
11 See especially 1992 Act, s 219.
12 The definition is now to be found in 1992 Act, s 244.
13 The injunction was uncontested. See http://blogs.journalism. co.uk/editors/2010/05/18/nujjohnston-press-blocks-staff-strike-with-legal-action/.
14 1992 Act, s 224.
15 1992 Act, s 226.
16 1992 Act, 226A.
17 1992 Act, s 226A (1)(b).
18 1992 Act, s 231A.
19 1992 Act, s 231.
20 1992 Act, s 234A. Action discontinuous if it intends it to take place only on some days on which there is an opportunity to take the action, and continuous if it intends it to be not so restricted (s 234A(6)).
21 *Metrobus*, above, para 45: «this is not legislation in which only the interests of unions and their members are relevant. It would be surprising if it were otherwise, given that a balance is in any event necessary between the rights afforded to workers by article 11, on the one hand, and the rights of the employer under article 1 of the First Protocol to the Convention on the other».
22 See *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578.
23 *Young, James and Webster v United Kingdom* (1982) 4 EHRR 483.
24 *Sigurjonsson v. Iceland* (1993) 16 EHRR 462.
25 As pointed out but ignored by the Court in *Young, James and Webster*, above.
26 See T. J. Christian and K D Ewing, «Labouring under the Canadian Constitution» (1988) 17 ILJ 73. The position in Canada appears to be changing following a recent decision of the Supreme Court of Canada: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* [2007] SCC 27, though see now Fraser v Ontario (AG) 2011 SCC 20. The position in Ireland remains grim. See *Ryanair v Labour Court and Impact* [2007] IESC 6.
27 *Demir and Baykara v Turkey*, 12 November 2008.
28 Ibid, para 157: «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».

29 Although these questions have not been answered, none of the cases on the right to strike post *Demir and Baykara* have been unsuccessful on this or on any other ground. The reasoning of the Court in *Demir and Baykara* in relation to collective bargaining strongly suggests that the scope of the right to strike must at least meet the standards set by the ILO, and that any restrictions will be permissible only if consistent with ILO standards: ibid, paras 162-7.

30 B. Gernigon, A. Odero, and H. Guido, «ILO Principles Concerning the Right to Strike» (1998) 137 Int Lab Rev 441.

31 CEACR, Individual Observation Concerning Convention No 87, Freedom of Association and Protection of the Right to Organise, 1948 United Kingdom (ratification: 1949) (1989).

32 Ibid.

33 These reports are easily accessible on the ILO website.

34 *Case C-438/05, The International Transport Workers' Federation & The Finnish Seamen's Union v Viking Line ABP & Oü Viking Line Eesti*, 11 December 2007.

35 The union took the unusual step of seeking a declaration in the High Court that its action was lawful. But the legal action was discontinued after a few days, whereupon the strike was called off. See K D Ewing and J Hendy QC, «The Dramatic Implications of Demir and Baykara» (2010) 39 ILJ 2.

36 CEACR, Individual Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) United Kingdom (ratification: 1949) (2010).

37 Ibid.

38 European Committee of Social Rights, Conclusions XIX-3 (2010) (United Kingdom).

39 Ibid.

40 Ibid.

41 See Trade Union and Labour Relations (Consolidation) Act 1992, s 238A.

42 European Committee of Social Rights, Conclusions XIX-3, above.

43 Ibid.

44 A trade dispute is defined in turn to mean a dispute between workers and their employer which relates wholly or mainly to one of seven permitted items listed in the statute – including, for example, terms and conditions of employment.

45 [2009] EWHC 2852 (QB).

46 [2010] EWCA Civ 173.

47 [2010] EWHC 1084 (QB).

48 Ibid, para 50.

49 The union was also told that it should have made direct inquiry to those members about whom it had incomplete data (again despite the fact that the legislation says clearly that the union is required only to provide such information as it has in its possession).

50 *British Airways plc v Unite the Union* [2009] EWHC 3541 (QB).

51 1992 Act, s 226A, 234A.

52 *British Airways plc v Unite the Union (No 2)* [2010] EWCA Civ 669.

53 Ibid., para 62.

54 *EDF Energy*, *Network Rail Infrastructure*, *British Airways plc*, *British Airways plc (No 2), Milford Haven Port Authority*, *Johnson Press*, *Serco Ltd* and *London and Birmingham Railway*. Not all employer applications were successful. Sometimes the slot machine jams: *London Underground Ltd v ASLEF* [2011] EWHC 7 (QB).

55 *EDF Energy*, *British Airways* (No. 2), *Milford Haven Port Authority*, *Serco Ltd* and *London and Birmingham Railway*.

56 *British Airways* (No. 2), *Milford Haven Port Authority*, *Serco Ltd* and *London and Birmingham Railway*.

57 *Milford Haven Port Authority v Unite* [2010] EWCA Civ 400.

58 *Enerji Yapi-Yol Sen v. Turkey* (Application No. 68959/01), 21 April 2009.

59 *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, para 35.

60 Ibid

61 Ibid., para 50.

62 [2009] EWHC 2852 (QB), para 4.

63 As a result, the contested restrictions in the Act were «not disproportionate restrictions on rights under article 11» (para 113).

64 [2009] EWHC 2852 (QB), para 4

65 [2009] EWHC 3541 (QB), para 27.

66 [2010] EWHC 1084 (QB), para 16.

67 [2010] EWCA Civ 173, para 13.

68 Ibid.
69 Ibid, para 17.
70 1992 Act, s 234A.
71 See *Milford Haven Port Authority v Unite*, above.
72 [2011] EWCA Civ 226.
73 Ibid., para 2 (Elias LJ).
74 Ibid., para 8.
75 Ibid.
76 Ibid., para 9.
77 See above, paras 20, 21.
78 [2011] EWCA Civ 226, paras 41, 96.
79 Ibid., para 94.
80 Ibid., para 103.
81 Ibid., para 94.
82 Ibid., para 8.
83 Ibid.