



Ruling of union boycott unlawful under EEA law did not violate Convention

In today's Chamber judgment¹ in the case of [Norwegian Confederation of Trade Unions \(LO\) and Norwegian Transport Workers' Union \(NTF\) v. Norway](#) (application no. 45487/17) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 11 (freedom of assembly and association) of the European Convention on Human Rights

The case concerned a domestic court judgment ruling a proposed boycott organised by NTF of a shipping firm by union dockworkers unlawful. The boycott had been in opposition to a shipping firm, Holship Norge AS, employing dockworkers outside of a collective framework agreement which had pertained in the port of Drammen.

The Court found overall that the Supreme Court of Norway's refusal to authorise the boycott had remained within its wide margin of appreciation and that it had advanced relevant and sufficient grounds to justify its final conclusion in the particular circumstances of this case and given its characterisation of the nature and the purpose of the proposed boycott. However, the Court emphasised that, from the perspective of Article 11, EEA freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality.

Principal facts

The applicants, the Norwegian Transport Workers' Union (NTF) and the Norwegian Confederation of Trade Unions (LO), are Norwegian trade unions based in Oslo. They were founded in 1896 and 1899 respectively. The first applicant union is a member of the second.

In the 1970s, the applicant trade unions entered into a collective framework agreement with the Confederation of Norwegian Enterprise (NHO), the largest employer organisation in Norway, and the Norwegian Logistics and Freight Association, in respect of a fixed pay scheme for dockworkers at many of the major ports in Norway. The framework agreement was renewed regularly.

Under the terms of the agreement, an office was set up in the port of Drammen, which was responsible for the employment of all permanent workers in that facility. It had worker and port-user representation.

In 2013 Holship Norge AS, a subsidiary of the Danish company Holship Holding A/S, decided to employ four workers at the port who, among other duties, were to load and unload their ships. The company was not a party to the framework agreement.

As a consequence, the NTF decided to organise a boycott of all shipping in Drammen involving Holship. It sought a declaratory judgment that the boycott would be lawful from the Drammen City

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Court, successfully. The Court gave extensive reasoning. That judgment was upheld by the Borgarting High Court.

Holship appealed to the Supreme Court. That court sought an advisory opinion from the Court of Justice of the European Free Trade Association (EFTA) States. The latter court stated the following:

“The system in the present case protects only a limited group of workers to the detriment of other workers, independently of the level of protection granted to those other workers ... Boycotts, such as the one at issue, detrimentally affect [the Holship employees’] situation. They are barred from performing the unloading and loading services and may even lose their employment if their employer affiliates to the Framework Agreement ... The boycott ... may touch upon fundamental rights of Holship, such as the negative right to freedom of association, and possibly that of its employees. ... It is for the [Norwegian courts] to determine ... whether the [boycott] at issue can be justified.”

On 16 December 2016, in a split decision, the Supreme Court ruled the boycott unlawful. It referred to the EFTA Court decision that Holship’s right to freedom of establishment under European Economic Cooperation (EEA) law might be infringed by the boycott. That right could justify restrictions of constitutional or Convention-based human rights. A fair balance had to be struck.

The Supreme Court adjudged that giving priority to workers employed via the administration office in the port of Drammen was a restriction on the freedom of establishment. However, EU and EEA law recognised protection of workers as a possible reason for restricting freedom of establishment. For the Supreme Court, this justification for restricting freedom was not adequate in the circumstances of the present case. Ultimately, the principal effect of the boycott would have been to limit the access of other operators to the market for loading and unloading services. The Supreme Court concluded that priority of engagement as demanded by the NTF was not sufficiently justified and did not satisfy the requirement to strike a fair balance between freedom of establishment and the possible fundamental right to boycott. It thus found the boycott unlawful.

Complaints, procedure and composition of the Court

Relying on Article 11 (freedom of assembly and association), the applicant unions complained of the decision to declare their notified boycott unlawful.

The application was lodged with the European Court of Human Rights on 15 June 2017.

Judgment was given by a Chamber of seven judges, composed as follows:

Síofra O’Leary (Ireland), *President*,
Mārtiņš Mīts (Latvia),
Stéphanie Mourou-Vikström (Monaco),
Lətif Hüseynov (Azerbaijan),
Jovan Ilievski (North Macedonia),
Ivana Jelić (Montenegro) and,
Anne Grøstad (Norway), *ad hoc Judge*,

and also Victor Soloveytchik, *Section Registrar*.

Decision of the Court

Article 11

The Court found that the boycott had sought to protect at least in part the occupational interests of union members in a manner which fell within the scope of Article 11 of the Convention and that that

provision was accordingly applicable. In addition, it was not contested that there had been an restriction of the trade unions' rights owing to the declaratory judgment finding it unlawful. The Court also declared that the 1947 Boycott Act had provided a sufficient legal basis for the Supreme Court's judgment. The question was thus whether the restriction flowing from the judgment had been necessary in a democratic society.

The Court reiterated that the purpose of Article 11 was to protect the individual against arbitrary interference by the authorities, but that there could in addition be obligations on the State to secure the effective enjoyment of such rights.

For the Court, the Supreme Court had engaged in an assessment of the fundamental right to collective action relied on by the applicant unions and the economic freedom under EEA law on which the employer had relied. It had ruled that the boycott had to be, among other things, reconciled with the rights that follow from the EEA Agreement and a fair balance had to be struck between these rights.

The Court noted that it was clear from the Supreme Court's judgment that its factual characterisation of the boycott – a means to compel acceptance of a right of priority engagement and notably with the desired effect being to limit the access of other operators to the market for loading and unloading services – had been central to its finding that such a fair balance had, in the particular circumstances of that case, been struck. On the basis of the material before it and given the findings of fact and domestic law by the domestic court, the Court considered that the latter had acted within the margin of appreciation afforded to it in this area when declaring the boycott unlawful.

Accordingly, there had been no violation of the Convention in the particular circumstances of this case.

The Court did however consider it necessary, given the manner in which the domestic court had effected the balancing, to note that it accepted that protecting the rights of others granted to them by way of EEA law could justify restrictions on rights under Article 11 of the Convention. However, when implementing their obligations under EU or EEA law, the Contracting Parties had to ensure that restrictions imposed on Article 11 rights did not affect the essential elements of trade union freedom, without which that freedom would become devoid of substance. It added that while it was primarily for the national courts to interpret and apply domestic law, if necessary in conformity with EU or EEA law, EEA freedom of establishment was not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality under Article 11.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.