Application 59253/11
POA and others v United Kingdom

Joint Submission
by
ETUC and TUC under Rule 44(5)

Introduction

1 The European Trade Union Confederation (ETUC) represents the interests of workers at European level. Founded in 1973, it now represents 85 trade union organisations in 36 European countries, plus 10 industry-based federations. The ETUC's prime objective is to promote the European Social Model and to work for the development of a united Europe of peace and stability where working people and their families can enjoy full human and civil rights and high living standards.

2 The Trades Union Congress (TUC) is the representative body of the British trade union movement. There are currently 58 trade unions affiliated to the TUC with a combined membership of 6.2 million working people from all walks of life. Affiliated members are drawn from both the public and private sector, and include the POA. The TUC campaigns to improve workers' rights at home and abroad, and is affiliated to the ETUC.

3 Both the ETUC and the TUC regard the right to strike as absolutely essential to the functioning of trade unionism in free societies. As will be demonstrated below, this view is reflected in international legal instruments. As a matter of principle, neither the ETUC nor the TUC accept that the nature of the work of prison officers makes it legitimate to remove their right to strike, so long as a minimum staff is provided to protect the essential safety and welfare of prisoners and the fabric of the establishments.

Right to Strike in International Law

4 It will be recalled that the Grand Chamber has specifically drawn attention to the importance of international law in the interpretation of the European Convention on Human Rights.[1] In accordance with this approach, the Third Section of the Court has recognised that the right to strike is guaranteed under Art 11 of the Convention.[2] This reflects the wide–ranging recognition of the right to strike, clearly set out in the 'Relevant International Law and Practice' section of the 'Statement of Facts'.[3] In addition to the instruments referred to there, we would add the ICCPR, Art 22, now

[1] *Demir and Baykara v Turkey* [2008] ECHR 1345, para 85.
[2] *Enerji Yapi-Yol v Turkey*, Application No 68959/01, 21 April 2009.
[3] This draws attention to the protection of the right to strike as provided by the ICESCR, the European Social Charter, the Community Charter of the Fundamental Social Rights of Workers, and the EU Charter of Fundamental Rights.

interpreted to include the right to strike.[4] We would also point out that the importance of ILO standards as the minimum below which countries should not fall is recognised by the ICESCR, Art 8, which in making provision for the right to strike does so on the basis that

> Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.[5]

- **The ILO**

5 As developed by the ILO supervisory bodies, the right to strike is widely applied. A valuable synthesis of the jurisprudence of the supervisory bodies is to be found in an important study by Gernigon, Odero and Guido. Consistently with the views expressed in the previous paragraph, the authors report that the ILO Committee of Experts has concluded that

> organizations responsible for defending workers' socio-economic and occupational interests should, in principle, be able to use strike action to support their position in the search for solutions posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and the standard of living.[6]

This is not to deny that there may be restrictions on the right to strike. According to the ILO Committee of Experts, however, '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'.[7]

6 Although there is wide protection for the right to strike, it is accepted by the ILO supervisory bodies that it may be permissible to impose restrictions on workers engaged in 'essential services'.[8] However, where such restrictions are imposed, the ILO jurisprudence requires that the workers in question 'should be afforded

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[4] Concluding Observations 8 November 1996 (CCPR/C/79/Add 73), para 18 (Germany); Concluding Observations 3 August 1993 (CCPR/C/79/Add 21), para 17 (Ireland). See also: 'The Committee is concerned that the new Labour Code is too restrictive in providing, inter alia, for the prohibition of strikes in services that cannot be considered as essential and requiring a two-thirds majority to call a strike, which may amount to a violation of Article 22. The State party should make the necessary amendments to the Labour Code to ensure the protection of the rights guaranteed under Article 22 of the Covenant'. (Emphasis of the last sentence deleted): Concluding Observations 4 May 2004 (CCPR/CO/80/LTU), para 18 (Lithuania).

[5] See also ICCPR, Art 22(2), which contains a provision similar to ICESCR, Art 8(3).

[6] B Gernigon, A Odero, and H Guido, 'ILO Principles concerning the Right to Strike' (1998) 137 *International Labour Review* 441, pp 446 – 7.

[7] ILO, Committee of Experts, Observation (United Kingdom) (1989): http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:2027752822319447::NO:13100:P13100_COMMENT_ID:2077801.

[8] 'in the strict sense of the term': Gernigon, Odero and Guido, above, p 450.

appropriate guarantees to compensate for this restriction'.[9] According to Gernigon, Odero and Guido, the Committee on Freedom of Association has emphasized the need for 'adequate, **impartial** and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are **fully and promptly implemented'**.[10] The Committee of Experts is acknowledged as having adopted a similar approach:

> If the right to strike is subject to restrictions or a prohibition, workers who are thus deprived of an essential means of defending their socio-economic and occupational interests should be afforded compensatory guarantees, for example conciliation and mediation procedures leading, in the event of a deadlock, to arbitration machinery seen to be reliable by the parties concerned. It is essential that the latter be able to participate in determining and implementing the procedure, which should furthermore provide sufficient guarantees of impartiality and rapidity; arbitration awards should be **binding on both parties** and once issued should be implemented rapidly and completely.[11]

- **The European Social Charter**

7 The right to strike is guaranteed by Art 6(4) of the European Social Charter and the Revised Social Charter. The United Kingdom has ratified the former and signed the latter. Under the Social Charters, it is expressly provided that like other provisions of the Charters, in some circumstances the right to strike may be subject to restriction and limitation (Art 31(1) of the Social Charter, and Art G(1) of the Revised Social Charter). The former provides that:

> The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

It does not follow from the foregoing, however, that a ban on the right to strike by prison officers would be consistent with these requirements, the European Social Rights Committee having raised questions on several occasions about the proportionality of such restrictions.

8 In 2006, in Conclusions relating to Estonia, the Committee expressed the following concern:

> The new legislation would prohibit strikes in the public sector only with regard to high state and government officials who exercise government authority as well as with regard to **prison** and police **officers**, employees in active military service and officials of security authorities. In order to assess **whether the restrictions** of the right to strike under the new legislation **fall**

[9] Ibid, p 453.
[10] Ibid.
[11] Ibid.

> **within the limits of Article G of the Revised Charter**, the Committee wishes the next report to indicate whether the new regulations have been adopted and their content.[12] (Emphasis added)

More recently, in 2010 in Conclusions relating to Albania, the Committee has said much more explicitly that it:

> further considered that a strike ban with respect to air traffic control, fire protection and **prison services** could serve a legitimate purpose since work stoppages in these sectors could pose threats to public order and national security. However **simply prohibiting all employees in these sectors from striking**, without any distinction as to their function, **cannot be considered proportionate**, and therefore necessary in a democratic society. In order to be able to assess the situation, the Committee asked whether the strike ban extends to all employees in these sectors or only to staff essential for maintaining necessary services. Meanwhile, it reserved its position on this point.[13] (Emphasis added)

Right to Strike in the United Kingdom

9 There is no right to strike in the United Kingdom. The point was made most recently by the Court of Appeal in *RMT v Serco Ltd*,[14] where Elias LJ said that:

> The common law confers no right to strike in this country. Workers who take strike action will usually be acting in breach of their contracts of employment. Those who organise the strike will typically be liable for inducing a breach of contract, and sometimes other economic torts are committed during the course of a strike. Without some protection from these potential liabilities, virtually all industrial action would be unlawful.[15]

In the same case, the Court of Appeal acknowledged that the right to strike was recognised in 'various international instruments', noting also that 'the ECHR 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 Art 11(1) of the [ECHR]'.[16] But although this is a welcome recognition of international realities, the substantial restrictions on trade union freedom in English law remain on the statute book.

- **Limited Scope of Legal Protection**

10 In the absence of a right to strike, trade unions have had to rely on immunities from common law liability granted by Parliament. The immunity arises in relation to the specific heads of liability mentioned in the Trade Union and Labour Relations (Consolidation) Act 1992, s 219. Although this is likely to cover the circumstances of

[12] Conclusions 2006 – Estonia – Article 6(4).
[13] Conclusions 2010 - Albania - Article 6(4).
[14] [2011] EWCA Civ 226, [2011] ICR 848.
[15] Ibid, para 2.
[16] Ibid, para 8.

most industrial action, problems arose recently in connection with industrial action by airline pilots that was said to violate the terms of the EU Treaty and to which the provisions of TULRCA 1992, s 219 provided inadequate cover. But even where the ground of liability alleged is covered by TULRCA 1992, s 219, the legal immunity applies only if the trade union was acting 'in contemplation or furtherance of a trade dispute'. As a result of a series of statutory amendments since 1980, the term 'trade dispute' is now narrowly defined in TULRCA 1992, s 244, to mean a dispute between workers and their own employer about matters relating directly to their employment. Forms of political protest action are prohibited, as are all forms of solidarity or secondary action.

11 Where action is 'in contemplation or furtherance of a trade dispute' as defined by TULRCA 1992, s 244, there will be no protection unless certain detailed procedural obligations are complied with. These procedural obligations impose on trade unions detailed obligations that to our knowledge are without precedent in any Council of Europe Member State. A trade union is required to give notice to the employer of its intention to hold an industrial action ballot, the notice to provide in meticulous detail information about the categories of workers and the workplaces of the workers to be balloted. Before the ballot is held, the union must also supply the employer with a copy of the ballot paper (which must comply with prescribed statutory requirements), and after the ballot is held the union must notify both its members and the employer of the full ballot result, failure to do so in a timely manner exposing the union to the risk of litigation by the employer. Finally, the union must give at least seven days notice of its intention to conduct industrial action, the notice to be similar in form as the ballot notice the union will already have provided.

- **Implications of Withdrawal of Legal Protection**

12 The freedom to take industrial action in the United Kingdom is thus very limited and heavily restricted. For different reasons (substantive and procedural), it has been found to be in breach of ILO Convention 87, and the European Social Charter. In 1994 this limited and restricted freedom was formally withdrawn altogether from prison officers who until a decision of the High Court in 1993 had been thought to enjoy the same industrial rights as everyone else. By virtue of the changes introduced in the Criminal Justice and Public Order Act 1994, it is unlawful to induce a prison officer to take industrial action (widely defined) or to commit a breach of discipline. In the event of such industrial action being taken, the Home Secretary may seek an injunction in the High Court to have it restrained, as when on 10 May 2012 prison officers joined a day of protest against government cuts, but returned to work as the government prepared to start legal proceedings.[17]

13 This latter event is important for revealing not only that prison officers are denied industrial rights, but also denied the democratic right to protest against the actions of government, in common with other workers. Apart from the liability of the applicant trade union for taking industrial action, the other consequence of the liability introduced by the 1994 Act is that prison officers who take part in industrial action are

[17] 'Prison Officers Hold Rare Strike as 35,000 Police Stage Largest-Ever March', *Daily Telegraph*, 10 May 2012. In the same article it is reported that staff remained at work to ensure that prisoners received meals and medication,

liable to dismissal for having done so. The general rule under English law is that it is unfair to dismiss workers for taking part in industrial action that is protected by TULRCA 1992, s 219 (action in furtherance of a trade dispute in relation to which the detailed statutory procedures have been followed): TULRCA 1992, s 238A. This protection (which applies to the first 12 weeks of a dispute) does not apply to prison officers, on the ground that industrial action on their part can never be lawful under TULRCA 1992, s 219.[18]

Right to Strike and Essential Services

14 British law does not prohibit workers from engaging in industrial action because they are employed in essential services, and it is now very unusual to withdraw the right to strike from any group of workers in the manner that has been done in relation to prison officers. The only other group to which similar restrictions apply is the police service, and it appears that the ban on prison officers taking industrial action arose as a result of the almost accidental discovery in 1993 that because prison officers enjoy some of the powers of police constables, they therefore cannot be 'workers' for the purposes of the TULRCA 1992, and that therefore they cannot be a party to a trade dispute with immunity from legal liability.[19] We return below to the implications of treating prison officers for these purposes as if they were police officers, and in the meantime draw the attention to government proposals to introduce similar restrictions for officers of the proposed new National Crime Agency.[20]

- **Emergency Powers Legislation**

15 Although British law thus does not recognise a category of workers engaged in essential services, this is not to deny that strikes by some groups of workers may have implications for the community as a whole. It is important to stress, however, that the traditional approach of British law was to seek to ameliorate the short-term consequences of the industrial action, rather than prohibit it from taking place. This approach was to be found in the Emergency Powers Act 1920, which applied where there were 'events of such a nature as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community of the essentials of life'. The government could declare a state of emergency and introduce emergency regulations, which would typically allow for the deployment of troops to ensure the supply of the essentials of life. It was expressly provided by the Emergency Powers Act that these regulations could not make it an offence to take part in a strike or to persuade others to do so.

16 Invoked on 12 occasions between 1921 and 1973,[21] the Emergency Powers Act 1920 has been replaced by the Civil Contingencies Act 2004, which retained the strategy adopted in 1920. The 2004 Act applies to a wider definition of emergency

[18] It is also to be noted that there is no protection in British law for workers who are victimised by means other than dismissal for taking part in industrial action.
[19] *Home Office v Evans*, 18 May 1993.
[20] Crime and Courts Bill 2012, cl 13.
[21] G Morris, *Strikes in Essential Services* (1986), p 51. The Act was invoked to deal with disputes by coalminers, electricity workers, dockers, rail workers, seafarers, and others.

situations, including 'an event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region'. For this purpose an event or situation threatens damage to human welfare only if it involves, causes or may cause (a) loss of human life, (b) human illness or injury, (c) homelessness, (d) damage to property, (e) disruption of a supply of money, food, water, energy or fuel, (f) disruption of a system of communication, (g) disruption of facilities for transport, or (h) disruption of services relating to health. Regulations may be made under the Civil Contingencies Act 2004 to deal with the emergency, and as with the former, the latter may not 'prohibit or enable the prohibition of participation in, or any activity in connection with, a strike or other industrial action'. The provisions of the 2004 Act have never been invoked to deal with industrial action.

- **Emergency Powers - 'Ad Hoc' Responses**

17 Although there are thus permanent powers to deal with industrial action, in recent years governments have preferred not to use these powers, eschewing the use of formal emergency powers in favour of more flexible intervention to ameliorate the consequences of a strike, while active steps are being taken to bring about a negotiated settlement. In some cases this may involve resort to emergency legislation, as in the Imprisonment (Temporary Provisions) Act 1980, which was passed at a time of industrial action by prison officers when such action was still permitted though rarely used. The Act facilitated the use of an unfinished dispersal prison and an army camp to be used until the dispute was resolved. It has been said that 'both establishments were run by senior prison staff in conjunction with the armed forces and the police', and that 'up to 955 prisoners were held there during the course of the dispute'.[22] Provision was also made for the detention of prisoners in police cells pending the resolution of the dispute.

18 The more common response of the government when dealing with industrial action in sensitive services is to rely on the army to perform the work of those in dispute. This is now a well-established practice, and indeed part of the purpose of the Imprisonment (Temporary Provisions) Act 1980 was to facilitate military involvement. Professor Morris records that between 1945 and 1982, the army was used to perform the work of strikers on 30 occasions, including disputes involving firefighters, refuse collectors and gas-workers.[23] More recently, the armed forces were deployed during periods of industrial action by firefighters in 2002-2003, while more recently still, a dispute in 2012 involving tanker drivers gave rise to the possibility that there would be industrial action that would restrict the supply of fuel to petrol stations. It was widely reported that in the media that troops were being trained to drive tankers and deliver fuel in the event that industrial action took place. The dispute was settled following negotiations between the employers and the trade union.

Prison Officers and Police Constables

[22] Ibid, p 81.

[23] Ibid, pp 100 – 103. Professor Morris is Deputy Chair of the Police Negotiating Board referred to below. The use of the troops generally takes place under the authority of the Emergency Powers Act 1964, which allows for the use of the armed forces to assist the civil power to perform 'urgent work of national importance'.

19 The prohibition on the right to strike by prison officers is thus very unusual in the British system. The current approach to industrial action is to (i) impose tight limits and restrictions before industrial action may be taken, but thereafter (ii) take steps in response to the consequences of the dispute in whatever sector it may take place. For all the difficulties facing workers and trade unions taking industrial action (and there are many), it is not the practice to prohibit such action. Apart from the special position of the armed forces, the only other group of workers who are prohibited from organising industrial action are the police,[24] and as we have pointed out it is partly because prison officers were said to enjoy some of the powers of police officers that they were held by the High Court to be excluded from the limited legal protection for industrial action in the TULRCA 1992, a decision that was a prelude to the current restriction in the Criminal Justice and Public Order Act 1994.

- **Police Negotiating Board Composition**

20 Since 1919, police officers have been forbidden to join a trade union. There are, however, representative organisations – the Police Federation, the Superintendents' Association and the Chief Police Officers' Staff Association – established for police officers. There is also a negotiating procedure established by statute in 1980 – and now governed by the Police Act 1996 - in the form of the Police Negotiating Board (PNB). The PNB is independent in the sense that it is composed of 22 members on the employers' side (representing police authorities), and 22 members on the police officers' side (representing the Police Federation, the Superintendents' Association and the Chief Police Officers' Staff Association). There is an independent chair and deputy chair appointed by the Prime Minister, and a secretariat provided by the government's Office of Manpower Economics.

21 Apart from the fact that it has a different function (pay negotiation rather than pay review), the PNB has a radically different composition from that of the Prison Service Pay Review Body (PSPRB). In the case of the PNB, members are appointed by the organizations or employers they represent; in the case of the Prison Service Pay Review Body the members are chosen by the government, by whom they are also briefed. So far as we are aware, neither the POA nor the Prison Service are even consulted about the appointments to the PSPRB, which at the present time is a body of seven people: a retired university vice chancellor, the Secretary – General of the Royal Economic Society, an HR consultant, a retired banker, a retired civil service trade union official, a company manager and Civil Service Commissioner for Northern Ireland, and a retired Rear Admiral. The prison service experience of the current members of the Pay Review Body is not clear from the PSPRB website.

- **Police Negotiating Board Functions**

22 It is also to be emphasised that the PNB is a negotiating body, which is altogether different from the PSPRB. As a negotiating body, the PNB has jurisdiction to deal

[24] By virtue of the Police Act 1996, s 91, 'Any person who causes, or attempts to cause, or does any act calculated to cause, disaffection amongst the members of any police force, or induces or attempts to induce, or does any act calculated to induce, any member of a police force to withhold his services, shall be guilty of an offence [punishable by imprisonment]'.

with a wide range of matters including pay. Under the Police Act 1996, s 61, the PNB has jurisdiction in relation to 'hours of duty, leave, pay and allowances, pensions or the issue, use and return of police clothing, personal equipment and accoutrements'. It is also to be noted that the PNB Constitution provides for situations that arise where there is deadlock between the parties. Where agreement cannot be reached, and the matter cannot be resolved by conciliation, a reference may be made (by either side) to arbitration. Arbitration is carried out by the Police Arbitration Tribunal (PAT), which operates under the auspices of the Advisory, Conciliation and Arbitration Service (ACAS), an independent statutory body, which also provides the secretariat to the PAT. Pensions is the only matter not arbitrable under this procedure.

23. Arbitration awards have the same standing as negotiated agreements, which means that they are merely recommendations which the Home Secretary must take into account in determining how terms and conditions are to be regulated. In practice, however, it is very unusual for PNB or PAT outcomes not to be accepted by the Home Secretary. Once approved, the terms of a negotiated agreement or arbitrated settlement are adopted as a draft statutory instrument and placed before Parliament for approval. The Police Regulations incorporating PNB agreements approved by the Home Secretary are thus legally binding. So far as matters outside the PNB procedure are concerned (such as recruitment standards, vetting procedures and performance and conduct procedures), these are considered by the Police Advisory Board of England and Wales (PABEW) on which the Police Federation is represented. Although the PABEW is not a negotiating forum and issues cannot be referred to arbitration, it nevertheless provides an acceptable consultative process, which produces outcomes normally implemented by the government.

Conclusion

24 The right to strike is fully recognized in international law as a fundamental human right, exercisable not only in relation to terms and conditions of employment, but more widely to enable workers to protest against the actions of government that directly affect them. There is no right to strike in the United Kingdom but only a series of protections from the common law liability of trade unions and their officials. These protections or immunities are narrow in scope in terms of the purposes for which industrial action may be taken, and subject to tight restrictions in terms of the procedures that must be followed before they may be engaged. British law does not recognize the need to prohibit strikes by workers in essential services, the preferred approach being to treat all workers in the same way and to intervene where necessary to address the consequences of industrial action until its causes have been resolved.

25 Both the ETUC and the TUC believe that the restrictions on prison officers should be repealed. Having regard to ECHR, Art 11(2), it is difficult to justify a **TOTAL** ban on **ALL** forms of industrial action by **ALL** prison officers. This is all the more so for the fact that the ban takes away both industrial and political rights, and for the fact that industrial action by prison officers was permitted before 1993. The current prohibition is also difficult to justify in view of the lack of adequate measures to compensate for the loss of the right to strike. The procedures for pay determination contrast unfavourably with the position of police officers, the only other major category of workers denied the right to strike. If it is possible to provide

an independent negotiating body to deal with police officers' pay, it ought to be possible to do the same for prison officers, while fully meeting obligations under international law.[25]

6 June 2012

[25] For government plans to extend the prison service model, see Crime and Courts Bill 2012, cl 14.