



**ECHR JUDGMENT IN ASLEF V
UK CASE – IMPLICATIONS FOR
TRADE UNION LAW**

Consultation Document

MAY 2007

THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE *ASLEF v UK* CASE : IMPLICATIONS FOR TRADE UNION LAW

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THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE *ASLEF v UK* CASE : IMPLICATIONS FOR TRADE UNION LAW

1. Introduction

1.1. On 27 February 2007, the European Court of Human Rights (the "Court") issued a judgment in the case of *Aslef v The United Kingdom* (Application no 11002/05). The full text of the judgment is reproduced here at **Annex A**. The judgment becomes final on 27 May 2007.

1.2 The case concerns the freedom of trade unions under GB law to expel or exclude individuals on the grounds of their political party membership, and the Court concluded that the relevant part of GB law violated Article 11 of the European Convention on Human Rights (the "Convention"). The UK Government does not intend to appeal the judgment, and recognises that the relevant part of trade union law in this country should be amended to ensure compatibility with the Convention. This consultation presents the Government's proposals in this area.

1.3 After the results of this consultation have been assessed and as soon as a suitable legislative vehicle is found, the Government will introduce measures to amend the relevant legislation.

1.4 This short consultation document describes the current legal framework and the measures taken by the Government in the Employment Relations Act 2004 to provide greater freedom to trade unions to exclude or expel political activists. It then summarises the Court's judgment. A final section sets out the options considered by the Government to amend the law. This section also poses three questions which respondents are asked to address.

Regulatory Impact Assessment

1.5 An initial regulatory impact assessment of the proposals in this consultation document is attached at **Annex D**.

How to respond to this consultation

1.6 Please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who or what the organisation represents and, where applicable, how the views of its members were assembled. Please submit your response to this consultation by post, email or fax to:

Harjinder Kaur
Employment Relations Directorate
Bay 462
Department of Trade and Industry
1 Victoria Street
London SW1H 0ET

Email : harjinder.kaur@dti.gsi.gov.uk

Fax : 0207 215 6414

Closing date

1.7 Responses must be received no later than 8 August 2007.

Confidentiality

1.8 All information, including personal information, provided in responses to this consultation may be subject to publication or disclosure in accordance with freedom of information legislation. If you wish that any other information you provide should be treated as confidential, please inform the DTI accordingly. You should be aware that under the Freedom of Information Act

2000, there is a statutory Code of Practice with which public authorities must comply and which, amongst other things, deals with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we then receive a request for disclosure of this information we will take full account of your explanation but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

List of consultees

1.9 A list of those organisations to whom we are sending this consultation document is provided at **Annex B**. If you have any suggestions about other organisations or individuals with an interest in this review, please let the DTI know and we will ensure they have access to this document.

Additional copies

1.10 Additional copies of this consultation document may be made without permission. Further printed copies may be obtained by post from DTI publications:

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Help with queries

1.11 If you have questions about any of the issues discussed in this document, please contact Harjinder Kaur by telephone (020 7215 6179) or by email (harjinder.kaur@dti.gsi.gov.uk).

Complaints about this consultation

1.12 The Code of Practice, with which this consultation should adhere, is set out in **Annex C**. If you wish to make a complaint about, or comment on, the way in which this consultation has been conducted, please contact:

Simon Towler
Consultation Co-ordinator
Better Regulation Team
Department of Trade and Industry
1 Victoria Street
London SW1H 0ET

Telephone: 0207 215 1964
Email: Simon.Towler@dti.gsi.gov.uk

2. The Existing Legal Framework

2.1 Under the law, any individual who wishes to join or remain a member of a trade union has the right to do so. The union may exclude or expel that person only for one of a number of permitted reasons. Those reasons are set out in section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the "1992 Act"). One of them is that the person's "conduct" is unacceptable. However, the section sets out the three following three categories of conduct, jointly classified as "**excluded conduct**", for which it is always unlawful for a union to expel or exclude a person, even where such conduct was a minor reason among several reasons for the union's decision to exclude or expel:

- current or former membership of a trade union ;
- current or former employment ; or
- conduct for which disciplinary action taken against an individual would be regarded as unjustifiable under section 65 of the 1992 Act.¹

2.2 Section 174 also establishes a further category of conduct called "**protected conduct**", which is essentially current or former membership of a political party. However, Section 174 explicitly states that the activities a person undertakes as a member of a political party do not constitute "protected conduct". It is unlawful for a union to exclude or expel a person wholly or mainly on the grounds of that person's "protected conduct". The net effect of these provisions is to provide some scope for a union lawfully to

¹ Broadly speaking, section 65 provides protection against disciplinary action by the union for three categories of conduct : first, where the conduct relates to a failure to support industrial action ; second, where the conduct relates to the making of an assertion that the union had breached its rules or statute, and the person making that assertion did so in good faith (i.e. not knowing that the assertion was false) ; and third, for a certain other types of conduct such as refusing to allow subscriptions to be deducted direct from pay.

expel or exclude its members on the basis of their political activities such as standing for political office or campaigning on behalf of a political party.

2.3 Prior to the Employment Relations Act 2004 (the "2004 Act"), when section 174 was significantly amended, the law made no explicit distinction between "political party membership" and "political party activities". Also, the previous law did not include membership of a political party in the definition of "conduct" for which it was lawful for a union to expel or exclude a person. So, before the 2004 Act, the ability of a union to act against political extremists was less clear and more restricted than now.

2.4 Individuals who believe they have been unlawfully excluded or expelled from a trade union may complain to an employment tribunal. Where the tribunal finds that the trade union has breached the law, it must make a declaration to that effect. The tribunal may also make a financial award to the individuals concerned to compensate them for the loss which exclusion or expulsion has caused. This compensation has an upper limit (currently £69,900). Also, where the trade union refuses to admit or re-admit those individuals into membership, the compensation is subject to a minimum figure (currently £6,600). However, the minimum award does not apply in cases where the exclusion or expulsion was unlawful because it was mainly attributable to "protected conduct" and where conduct contrary to a rule or objective of the trade union was a subsidiary reason for the union's decision to expel or exclude. The provision to disapply the minimum award was introduced in the 2004 Act, and was designed to ensure that political extremists had limited financial incentive to make a complaint to a tribunal where their political activities were contrary to the stated position of the trade union. Prior to the 2004 Act, the minimum award of compensation applied to all cases where the exclusion or expulsion was based on political party membership.

3. The Court's Judgment

3.1 The case concerns a decision taken in April 2002 by the Executive Committee of the Associated Society of Locomotive Engineers and Firemen (ASLEF) to expel Mr Lee, a member of the British National Party (BNP) who had stood as a BNP candidate in local elections. The union had contended that Mr Lee's political party conduct was incompatible with his membership of ASLEF and against the objects of the union. Mr Lee complained to an employment tribunal that he had been unlawfully expelled under section 174 of the 1992 Act. The tribunal heard his case twice because its first judgment was successfully appealed to the Employment Appeal Tribunal (EAT). On 6 October 2004, the second tribunal upheld Mr Lee's complaint on the grounds that his expulsion was primarily because of his BNP membership. ASLEF consequently re-admitted Mr Lee back into membership.

3.2 On 24 March 2005, ASLEF applied to the Court that the law underpinning the tribunal's decision in the Lee case is incompatible with Article 11 of the Convention concerning the freedom of assembly and association. The Court reached its judgment against the UK on 27 February 2007. A copy of the judgment is at **Annex A**.

3.3 Mr Lee's case was one of a number of complaints faced by trade unions around 2002 and 2003 concerning their decisions to expel or exclude individuals who belonged to the BNP or similar political organisations. This group of cases gave rise to the measures taken in the 2004 Act to amend the 1992 Act, which were summarised in the previous section. The tribunals considered Mr Lee's complaint under the law which preceded the 2004 Act, as his expulsion had occurred before the amendments came into force. In contrast, the Court assessed ASLEF's application against the law applying both before and after the provisions of the 2004 Act took effect. Its judgment therefore has direct implications for the compatibility of the current law with Article 11.

3.4 The substance of this case concerned competing rights under the Convention. For the union, there were the Article 11 rights to determine its own membership and the entitlement of its membership to decide in accordance with the union's rules with whom they wished, and did not wish, to associate as their fellow members. As regards Mr Lee, there were his rights under Article 11 to associate with others by belonging to a trade union and his rights under Article 10 to hold and express his political opinions. According to the Court, the "crucial question" in this case was "whether the State has struck the right balance between Mr Lee's rights and those of the...union".

3.5 The Court's judgment sets out the general principle that trade unions must be "free to decide, in accordance with union rules, questions concerning admission to or expulsion from the union". The Court then went on to consider the circumstances where it was appropriate to depart from that general principle, in accordance with the second paragraph of Article 11, which specifies that any limitations on the freedom of association are "prescribed in law" and "necessary in a democratic society". Paragraphs 42 to 46 of the judgment specify some general considerations which relate to the imposition of any limitations.

3.6 When applying these principles and considerations to the circumstances of the Lee case, the Court accepted that the law aimed to protect the rights of individuals to exercise their political freedoms without hindrance. However, the Court noted that Mr Lee would not suffer any "identifiable hardship" or detriment as a result of his exclusion from the union because, for example, any collective agreement negotiated by the union would still apply to him. Nor had his expulsion affected "in any significant way" his ability to exercise lawful political activities. The Court also noted that the trade union had not behaved unreasonably or arbitrarily because it had acted in accordance with its rules and established procedures. The Court was also mindful that European trade unions often have "strongly held views on social and political issues". It is a common practice for them to affiliate to "political parties or movements, particularly those on the left". Mr Lee's political values and beliefs were clearly inconsistent with ASLEF's. In the

light of these considerations, the Court concluded that the UK, even allowing for a margin of appreciation, had not struck the right balance between the competing rights and had violated Article 11.

4. Amending the Legal Framework

4.1 The Government acknowledges that it must amend trade union law to ensure that the violation of Article 11 is removed. The changes made in the 2004 Act were welcomed by trade unions and created more freedom for them to deal with politically-motivated individuals who infiltrate their ranks. However, the judgment of the Court indicates that the 2004 Act did not go far enough. According to the Court, trade unions must be given greater autonomy to decide whether the political party membership of individuals should debar them from belonging to the union.

4.2 The judgment was rooted in the circumstances of this particular case, where there was a stark contrast between the political positions of Mr Lee and ASLEF. The Court did not give any opinion as regards other limitations under UK law on the ability of trade unions to expel, exclude or otherwise discipline their members. Nor do the general principles set out in the Court's judgment imply that there can be no justification under Article 11 for other limitations on the freedom of trade unions to determine their membership. The UK Government therefore firmly maintains its position that the other legal restrictions under UK law in this area are necessary in a democratic society and strike a fair balance between the interests of trade unions, their members and their prospective members.

4.3 The UK Government therefore concludes that only those aspects of section 174 of the 1992 Act which refer to political party membership and activities need to be changed to ensure complete compliance with Article 11.² There are two main options to amend section 174 which it asks respondents to consider :

Option (A) - Section 174 should be amended to ensure there is no explicit reference to a special category of conduct relating to political party

² The Government recognises that there may be some consequential changes to section 176 and other sections of the 1992 Act which may be needed to ensure consistency with any redrafting of section 174.

membership or activities. This change would in effect position political party membership and activities under the general heading of "conduct" (which was the situation before the Trade Union Reform and Employment Rights Act 1993 was implemented). Where such political party membership or activities were "unacceptable" to the trade union, it would therefore be lawful for the union to expel or exclude on those grounds.

Option (B) - The special category of conduct relating to political party membership and activities should be retained but the rights not to be excluded or expelled for such conduct should be significantly amended. The amendment would refer to the limited conditions under which it would remain unlawful for the trade union to exclude or expel an individual on the grounds of their political party membership or activities. Those conditions would specify that the union's decision would be unlawful unless the political party membership or activity concerned was incompatible with a rule or objective of the union, and the decision to exclude or expel was taken in accordance with union rules or established procedures.

4.4 Option A would significantly simplify the wording of section 174. It would provide trade unions with much greater autonomy in deciding their membership. However, there would be no special safeguards against possible abuse. Such safeguards may not be necessary in any event : there is no evidence that trade unions would make use of this greater freedom by expelling members or activists of mainstream political parties. Also, if a trade union acted outside its rules when expelling a member, then that person could seek legal redress by bringing a breach of rule claim before the courts.

4.5 In contrast, Option B would specify particular safeguards against potential abuse. Those safeguards are based on the reasoning of the Court which noted the need for the trade union to avoid arbitrary behaviour and to act transparently in accordance with its rules. Many union rule books now refer to racist, xenophobic or extremist political behaviour as unacceptable to the union. So, little adaptation by those trade unions would be needed in order to comply with this Option. Where a trade union was required to amend

its rule book, then members and potential members should gain because they would be properly informed of the potential consequences of their political actions. Option B might, however, create grey areas and give scope for legal action to arise about the precise meaning of a union's rules or objectives.

Question 1 - What is your assessment of the Court's judgment and do you agree with the Government's proposal to respond to the judgment by adopting either Option A or Option B ?

Question 2 - Which Option (either A or B) do you prefer ?

Question 3 - Do you have any other comments on this issue or the Regulatory Impact Assessment which accompanies it ?

**CASE OF ASSOCIATED SOCIETY OF LOCOMOTIVE ENGINEERS &
FIREMEN (ASLEF) v. THE UNITED KINGDOM**

(Application no. 11002/05)

JUDGMENT

STRASBOURG

27 February 2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr J. CASADEVALL, *President*,

Sir Nicolas BRATZA,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA,

Mrs P. HIRVELÄ, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 6 February 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 11002/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the Associated Society of Locomotive Engineers & Firemen (ASLEF) ("the applicant"), on 24 March 2005.

2. The applicant was represented by Thompsons, solicitors practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms K. McCleery of the Foreign and Commonwealth Office, London.

3. The applicant trade union alleged that it had been prevented from expelling one of its members due to his membership of the British National Party, a political party which advocated views inimical to its own. It invoked Article 11 of the Convention.

4. On 7 December 2005, the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a trade union, representing mainly train drivers on the United Kingdom's railways. Founded in 1880, it has some 18,000 members and most train drivers are members of ASLEF. It is an independent trade union. The various companies on the United Kingdom rail network do not

operate a “closed shop” and railway workers, including drivers, are free to join ASLEF or other unions or not to join a union at all.

6. Its Rules provide that its objects include, as well as regulating relations between workers and employers and protecting the welfare of members and the industry, that it “assist in the furtherance of the labour movement generally towards a Socialist society (Rule 3.1(vii) and to “promote and develop and enact positive policies in regard to equality of treatment in our industries and ASLEF regardless of sex, sexual orientation, marital status, religion, creed, colour, race or ethnic origin” (Rule 3.1(viii)).

7. In 1978 the Annual Assembly of Delegates (“AAD”) of ASLEF, its governing body, resolved, pursuant to rule 14(a) of ASLEF rules, that “this AAD being concerned with the rise of Fascist activists and groups instruct the Executive Committee to campaign vigorously to expose the obnoxious policies of political parties such as the National Front.”

8. In February 2002, a Mr Lee (a member of the far-right, lawful, British National Party (‘BNP’), previously known as the National Front) applied for membership in ASLEF and was accepted. In April 2002 Mr Lee stood as a candidate in the local elections in Bexley for the BNP.

9. On 17 April 2002 an ASLEF trade union officer sent a report to the General Secretary concerning Mr Lee, attaching information that Mr Lee was an activist in the BNP, had handed out anti-Islamic leaflets dressed as a priest and that in 1998 he had stood as a candidate for the BNP in Newham. The report included an article written by Mr Lee for Spearhead (the BNP magazine) and a fax from Bexley Council for Racial Equality stating that Mr Lee had seriously harassed Anti-Nazi League pamphleteers, including taking pictures of them, taking their car numbers, making throat-cutting gestures and following one woman in his car and visibly noting her home address, which matters had been reported to the police.

10. On 19 April 2002, an Executive Committee meeting of ASLEF voted unanimously to expel Mr Lee, who was so informed by a letter of 24 April 2002, which stated that his membership of the BNP was incompatible with membership with ASLEF, that he was likely to bring the union into disrepute and that he was against the objects of the union.

11. Mr Lee appealed against the expulsion and was informed that a hearing would take place on 13 March 2003. On 20 February 2003, he stated that he would not attend. On 13 March 2003, the Appeals Committee of ASLEF met and rejected his appeal.

12. On 18 May 2002, AAD resolved “that membership of the BNP or similar Fascist organisation is incompatible with being a member of ASLEF as determined under Rule 5-Objects. Therefore any members of BNP who are members of, or apply for membership, of ASLEF shall be removed from membership or refused membership.” The rules were changed accordingly to read:

Rule 4.1(d):

“No person shall be admitted into membership of ASLEF if by choice they are members of, supporters of, or sympathisers with, organisations which are diametrically opposed to the objects of the union, such as a fascist organisation.”

13. In the meantime, Mr Lee had brought proceedings in the Employment Tribunals (‘ET’) in respect of his expulsion, on the basis of section 174 Trade

Union and Labour Relations (Consolidation) Act 1992 ('section 174'), which prohibits trade unions from excluding a person or expelling a member wholly or to any extent on the ground that the individual is or was a member of a political party. The ET found in favour of Mr Lee on 21 May 2003. The applicant appealed to the Employment Appeal Tribunal ('EAT'), which on 10 March 2004 found that the first ET had fallen into serious errors of law, quashed the decision and remitted it to a second ET.

14. The EAT considered that it could construe section 174 without the need to resort to Article 11. It noted the parties' submissions, including the applicant's reliance on the decision in *Cheall v. the United Kingdom* (no. 10550/83, Comm. Dec. 13.5.85, D.R. 42, p. 178) and continued:

"As we have indicated [counsel for the applicant] accepts that we are not in a position to grant a declaration of incompatibility, on the one hand... But it is also clear to us that the very existence of competing claims under Article 11 (albeit that it would seem to us, on the authorities, that, absent a case of prejudice to livelihood, in this case [the applicant's] right of negative association for the Union and its members would seem likely to override the asserted right of association of [Mr Lee]) renders it more appropriate for us to seek to resolve the construction of the statute without reference to those competing rights. [Counsel for the applicant], while reserving his position, does not dissent from that course, and [counsel for Mr Lee] said that he understood, and indeed accepted that it was thereby being assumed in [his favour] that there is at least arguable an Article 11 right, such as he asserts."

15. The EAT's conclusion on the meaning of section 174 was that a union could rely as a legitimate ground for expulsion on the conduct of the expelled member so long as that conduct was not the fact of being a member of a political party. It found that a union could not rely on conduct which was a "*necessary act for the purpose of being or continuing to be a member*" (at paragraph 29 of its judgment). It specifically rejected the submission advanced by the applicant that included in the concept of membership (and thus amounting to conduct on which the union was not permitted to rely) was conduct as a member, or in the capacity as a member, of a political party (paragraph 28.5 of the EAT judgment).

16. A second ET again upheld Mr Lee's complaint by way of decision promulgated on 6 October 2004. It rejected the applicant's defence that Mr Lee's expulsion was entirely attributable to his conduct (apart from the fact of membership of the BNP) for the purpose of section 174, holding that the expulsion was "*primarily because of his membership of the BNP*" (paragraph 25 of its judgment).

17. The applicant did not appeal to the EAT against the second decision of the ET.

18. In consequence of the second decision of the ET, the applicant has been obliged to re-admit Mr Lee to the membership of the Union. It is in breach of its own Rules in so doing. Had the applicant not re-admitted Mr Lee, it would have been liable to pay him compensation in such sum as the ET considered just and equitable (subject to a statutory minimum of, currently, just over 8,600 euros (EUR), with no upper limit). Even though it has re-admitted Mr Lee, the applicant remains exposed to an application from Mr Lee for compensation in such sum as the ET considers just and equitable but

subject to an upper limit of around EUR 94,200. It does not appear that Mr Lee has made any such application.

II. RELEVANT DOMESTIC LAW

19. Section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 reads in relevant part:

(1) An individual shall not be excluded or expelled from a trade union unless the exclusion or expulsion is permitted by this section.

(2) The exclusion or expulsion of an individual from a trade union is permitted by this section if (and only if) –

...

(d) the exclusion or expulsion is entirely attributable to his conduct.

...

(3) For purposes of subsection 2(d) ‘conduct,’ in relation to an individual, does not include –

(a) his being or ceasing to be, or having been or ceased to be -

(...)

(iii) a member of a political party, or ...”

20. Subsequent to the decision of the second ET in Mr Lee’s case, section 174 was amended (with effect from 31 December 2004) to read as follows (again in material part only):

“(1) An individual shall not be excluded or expelled from a trade union unless the exclusion or expulsion is permitted by this section.

(2) The exclusion or expulsion of an individual from a trade union is permitted by this section if (and only if) –

(...)

(d) the exclusion or expulsion is entirely attributable to conduct of his (other than excluded conduct) and the conduct to which it is wholly or mainly attributable is not protected conduct.

...

(3) For purposes of subsection (2)(d) “excluded conduct,” in relation to an individual, means –

(a) conduct which consists in his being or ceasing to, or having been or ceased to be, a member of another trade union

(b) conduct which consists in his being or ceasing to be, or having been or ceased to be, employed by a particular employer or at a particular place, or

(c) conduct to which section 65 (conduct for which an employer may not be disciplined by a union) applies or would apply if the references in that section to the trade union which is relevant for the purposes of that section were references to any trade union.

(4A) For the purposes of subsection (2)(d) “protected conduct” is conduct which consists in the individual’s being or ceasing to be, or having been or ceased to be, a member of a political party.

(4B) conduct which consists of activities undertaken by an individual as a member of a political party is not conduct falling within subsection (4A). ..”

21. Section 177(1)(b) provides that “*conduct’ includes statements, acts and omissions.*”

III. RELEVANT INTERNATIONAL MATERIALS

A. Council of Europe

22. Article 5 of European Social Charter 1961 provides for the following “right to organise”:

“With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.”

23. In that context, the European Committee of Social Rights of the Council of Europe (formerly the “Committee of Independent Experts”, which is the supervisory body of the European Social Charter 1961 has given consideration on numerous occasions to sections 174-177 of the 1992 Act. Concern with the interference by section 174 in the right of trade unions to fix their own rules and choose their own members was expressed by the Committee in Conclusions XIII-3, p. 109; Conclusions XV-1 p. 629; and in November 2002, Conclusions XVI-1, p. 684 where it held:

“Section 174 of the 1992 Act limits the grounds on which a person may be refused admission to or expelled from a trade union to such an extent as to constitute an excessive restriction on the rights of a trade union to determine its conditions for membership and goes beyond what is required to secure the individual right to join a trade union....The Committee concludes that, in light of the provisions of the Trade Union and Labour Relations (Consolidation Act) 1992 referred to above (sections 15, 65, 174 and 226A) the situation in the United Kingdom is not in conformity with Article 5 of the Charter”

24. In Conclusions XVII-1 (2004) it again concluded that the United Kingdom was not in conformity with Article 5 of the Charter as section 174 constituted an excessive restriction on trade unions’ right to determine their membership conditions.

B. The International Labour Organisation (“ILO”)

25. The (ILO) Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87) provides, *inter alia*:

“Part I. Freedom of Association

...

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

THE LAW

I. THE GOVERNMENT’S PRELIMINARY OBJECTION AND ADMISSIBILITY

A. The parties’ observations

26. The Government submitted that the application should be rejected for non-exhaustion of domestic remedies, as although the applicant had raised a claim under Article 11 of the Convention in the EAT it did not press that submission at the oral hearing and accepted that the EAT should proceed to interpret section 174 without reference to Article 11. It was then not able to pursue an appeal against the EAT for ignoring that claim. In particular, the applicant did not require the EAT to apply section 3 of the Human Rights Act 1998, by seeking to construe the legislation so as to make it compatible with its Convention right. It was only concerned to ensure that it could rely on Mr Lee’s various activities as the basis for expelling him; it did not propose any construction of section 174 which would have accorded with its case before this Court, namely that it had an Article 11 right to determine its own membership. They submitted that Article 35 § 1 was not satisfied where an applicant relied on some other ground for impugning a measure, ignoring a possible Convention argument (*Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III). They asserted that, if the applicant had pressed its submission that Article 11 entitled it to choose its own membership save where exclusion or expulsion caused loss of livelihood and that submission had been accepted, there was ample scope for a creative interpretation of section 174 which would have given effect to that conclusion, including the possibility of reading in a clause “save as necessary to avoid breach of Convention rights”.

27. Insofar as the applicant argued that it was unable to appeal from the EAT as it had been successful, the Government further submitted that the Court of Appeal could still admit such appeals in “exceptional circumstances”. Further, the applicant could have pursued a declaration of incompatibility under section 4 of the HRA before the Court of Appeal, which could be an effective remedy as found in *Upton v. the United Kingdom* (no. 28900/04, decision of 11 April 2006) as, if successful, this would have obliged the Government to change the law to allow the expulsion on ground of BNP membership.

28. The applicant submitted that its counsel made full submissions on Article 11 to the EAT and that it was entirely wrong to assert that it was accepted by him that the EAT should ignore Article 11. Counsel did rely on section 3 submitting that section 174 should be construed so far as possible in accordance with Article 11, so that the phrase ‘member of a political party’ be construed as narrowly as possible so as to be limited to mere membership

and thus to permit expulsion for activities other than the mere fact of membership: it was not possible in that context to construe the term “member of a political party” so as to permit a union to expel a person just because he or she was a member of a political party. It only desisted in pursuing its submissions further orally after the EAT made clear that it was not inclined to decide the point and gave indications that ASLEF was in any event unlikely to be successful on the point. Furthermore, as the applicant had been successful in its appeal to the EAT no appeal could have been brought against that decision to the Court of Appeal. In any event any appeal would have been hopeless as it was not impossible to ignore the words of section 174 altogether. It noted that the Government accepted that once the second employment tribunal had made its decision there was no further domestic remedy that could have been pursued with any prospect of success.

B. The Court’s assessment

29. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, judgment of 18 December 1996, ECHR 1996-VI, §§ 51-52, and *Akdivar and Others v. Turkey*, judgment of 16 September 1996, ECHR 1996-IV, §§ 65-67).

30. In the present case, the Court observes that the applicant trade union raised complaints in the proceedings under Article 11 claiming that it had the right to choose its own membership. The argument was, the Government conceded, made before the EAT; however the Court cannot accept the Government’s assertion that the applicant somehow waived or dropped this part of his case. It appears rather from the terms of the EAT judgment that, in face of that Tribunal’s view that Article 11 was irrelevant and that they should seek to resolve the construction of the statute without reference to the competing rights under that provision, the applicant’s counsel reserved his position. As, therefore, the issues were squarely raised before the EAT and indeed considered, the Court does not consider that on this basis the applicant has failed to exhaust domestic remedies. Nor is it persuaded that the applicant could, given the EAT ruling was in his favour on other grounds, have appealed to the Court of Appeal and applied in addition for a declaration of incompatibility, as it was in effect the winning party and appeal lies against orders not reasons or findings. While the Government asserted that the Court of Appeal could admit an appeal by a winning party in exceptional circumstances, there is no indication that this case fell within such a category. The Government have not argued that the applicant should have appealed when it lost before the second Employment Tribunal and the Court sees no

basis on which to differ, given the Employment Appeal Tribunal's earlier stance and the findings of fact reached by the first instance body.

31. The Court therefore rejects the Government's preliminary objection on non-exhaustion. It further notes that the application is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

32. Article 11 of the Convention provides:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. The parties' observations

1. *The Government*

33. The Government accepted that section 174 represented an interference with rights under Article 11 § 1 in interfering with the autonomy which a trade union would otherwise possess in the matter of determining its membership. The restrictions imposed in respect of membership of a political party were, however, justified as necessary and proportionate. They relied on the importance of the countervailing rights of trade union members and prospective members to freedom of expression and freedom of association which would be engaged by expulsion from a trade union. Those rights were at the very foundation of democratic society, not least as the case concerned sanctions in respect of membership of a political party. They also claimed that a wide discretion remained for trade unions to expel or exclude on grounds of political activities. Section 174 only imposed a limited restriction on expelling those with views inimical to the trade union's objectives; it was only the applicant's own error in approach that led to a problem as there was ample conduct by Mr Lee, going beyond mere membership of the BNP, which the applicant could have relied on in order to found an entirely lawful decision to expel him.

34. The Government also emphasised the special status of trade unions which set them apart from other voluntary associations, pointing out that they play a potentially very important role in the working lives of individuals and exercising a direct influence over matters such as pay, holidays and other terms and conditions of employment, such that the Government were justified in imposing some limits on the applicant's power to confer or withhold the considerable benefits of membership. Finally, they relied on the wide margin of appreciation which applied when striking a balance between the autonomy

of trade unions and the Articles 10 and 11 rights of individual members and prospective members.

2. The applicant

35. The applicant submitted that there was no justification for the interference with its right to determine its membership. There was no interference with Mr Lee's freedom of expression as expulsion did not interfere with his right to express his political views. In any event any sanction was minimal and did not take priority over its right, and its members' rights, to exercise their own freedom of association and expression. Mr Lee never claimed that he suffered any detriment from exclusion. It referred to Article 17 to the effect that Article 10 would not protect some-one engaged in destroying other rights and freedoms. Since it was committed to opposing race discrimination, it would interfere with its rights, and its members, to be forced to admit into membership a person who was a member of such a right wing organisation. It did not accept that section 174 imposed a limited restriction, pointing out that it simply did not wish to associate with those whom they regarded as fascists or members of extreme right wing parties, whether active or not. It claimed that it had the right to dissociate itself from those whose political membership they abhorred. While Mr Lee's status as an activist might furnish greater reason to expel him, this did not touch on the fundamental issue. It would be acceptable if section 174 were framed so as to limit exclusion to membership of a party the objectives of which were contrary to the objectives of the trade union.

36. The applicant did not consider its role as a trade union was significant as alleged, since the collective bargaining that it was involved in applied to all, not just its members. There was nothing to suggest that Mr Lee lost any benefit in his working life from exclusion from ASLEF. Finally the applicant denied that there was a wide margin of appreciation as this was a situation where domestic law ran counter to freedom of association and considered that the Court was not precluded from examining the proportionality of the measure and ensuring a fair balance was struck.

B. The Court's assessment

1. General principles

37. The essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected. The right to form and join trade unions is a special aspect of freedom of association which also protects, first and foremost, against State action. The State may not interfere with the forming and joining of trade unions except on the basis of the conditions set forth in Article 11 § 2 (see *Young, James and Webster v. United Kingdom*,. Commission's report of 14 December 1979, § 162, Eur. Court H.R., Series B no. 39, p .45

38. The right to form trade unions involves, for example, the right of trade unions to draw up their own rules and to administer their own affairs. Such trade union rights are explicitly recognised in Articles 3 and 5 of ILO Convention No. 87, the provisions of which have been taken into account by the Convention organs in previous cases (see *e.g. Cheall v. the United*

Kingdom, no. 10550/83, Comm. Dec. 13.5.85, D.R. 42, p. 178; *Wilson & the National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 34, ECHR 2002-V). *Prima facie* trade unions enjoy the freedom to set up their own rules concerning conditions of membership, including administrative formalities and payment of fees, as well as other more substantive criteria, such as the profession or trade exercised by the would-be member.

39. As an employee or worker should be free to join, or not join a trade union without being sanctioned or subject to disincentives (e.g. *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, *mutatis mutandis*, *Wilson & the National Union of Journalists and Others*, cited above), so should the trade union be equally free to choose its members. Article 11 cannot be interpreted as imposing an obligation on associations or organisations to admit whosoever wishes to join. Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership. By way of example, it is uncontroversial that religious bodies and political parties can generally regulate their membership to include only those who share their beliefs and ideals. Similarly, the right to join a union “for the protection of his interests” cannot be interpreted as conferring a general right to join the union of one’s choice irrespective of the rules of the union: in the exercise of their rights under Article 11 § 1 unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union (*Cheall*, cited above; see also Article 5 of the European Social Charter and the Conclusions of the European Committee of Social Rights, Relevant International Materials, paragraphs 22-24 above).

40. This basic premise holds good where the association or trade union is a private and independent body, and is not, for example, through receipt of public funds or through the fulfilment of public duties imposed upon it, acting in a wider context, such as assisting the State in securing the enjoyment of rights and freedoms, where other considerations may well come into play (e.g. *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A no. 23, § 50, *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, § 26-27, where in providing education throughout the country, the State is responsible for both public and privately run schools §§26-27; or, *mutatis mutandis*, organisational frameworks for trades or professions where membership may well be compulsory or highly regulated e.g. public law institutions which are not covered by Article 11 § 1 at all: *Sigurður A. Sigurjónsson v. Iceland*, judgment of 30 June 1993, Series A no. 264, § 31).

41. Accordingly, where the State does intervene in internal trade union matters, such intervention must comply with the requirements of Article 11 § 2, namely be “prescribed by law” and “necessary in a democratic society” for one or more of the permitted aims. In this context, the following should be noted.

42. Firstly, “necessary” in this context does not have the flexibility of such expressions as “useful” or “desirable” (*Young, James and Webster*, cited above, § 63).

43. Secondly, pluralism, tolerance and broadmindedness are hallmarks of a “democratic society” (*Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49). Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. For the individual right to join a union to be effective, the State must nonetheless protect the individual against any abuse of a dominant position by trade unions (see *Young, James and Webster* judgment, cited above, § 63). Such abuse might occur, for example, where exclusion or expulsion from a trade union was not in accordance with union rules or where the rules were wholly unreasonable or arbitrary or where the consequences of exclusion or expulsion resulted in exceptional hardship (see *Cheall*, cited above, *Johanssen v. Norway*, no. 13537/88, Comm. Dec. 7.5.90).

44. Thirdly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued (amongst many authorities, *Handyside*, cited above, p. 23, § 49).

45. Fourthly, where there is a conflict between differing Convention rights, the State must find a fair and proper balance (see no. 11366/85, Comm. Dec 16.10.86, DR 50 p. 173; *Gaskin v. the United Kingdom*, judgment of 7 July 1989, Series A no. 160, §§ 42-44).

46. Finally, in striking a fair balance between the competing interests, the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (amongst many authorities, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 98, ECHR 2003-VIII). However, since this is not an area of general policy, on which opinions within a democratic society may reasonably differ widely and in which the role of the domestic policy-maker should be given special weight (see e.g. *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that the margin of appreciation “available to the legislature in implementing social and economic policies should be a wide one”), the margin of appreciation will play only a limited role.

2. Application in the present case

47. The question that arises in the present case concerns the extent to which the State may intervene to protect the trade union member, Mr Lee, against measures taken against him by his union, the applicant.

48. It is accepted by the parties in this case that section 174 had the effect in this case of prohibiting the applicant from expelling Mr Lee as it barred unions from such action where it was motivated, at least in part, by membership of a political party. This constituted an interference with the applicant’s freedom of association under the first paragraph of Article 11 which requires to be justified in the terms set out above.

49. In the context of the case, lawfulness is not an issue. Nor is it disputed that the measure had the aim of protecting the rights of individuals, such as Mr Lee, to exercise their various political rights and freedoms without undue hindrance. The crucial question is whether the State has struck the right balance between Mr Lee’s rights and those of the applicant trade union.

50. Taking due consideration of the Government's argument as to the importance of safeguarding fundamental individual rights, the Court is not persuaded however that the measure of expulsion impinged in any significant way on Mr Lee's exercise of freedom of expression or his lawful political activities. Nor is it apparent that Mr Lee suffered any particular detriment, save loss of membership itself in the union. As there was no closed shop agreement for example, there was no apparent prejudice suffered by the applicant in terms of his livelihood or in his conditions of employment. The Court has taken account of the fact that membership of a trade union is often regarded, in particular due to the trade union movement's historical background, as a fundamental safeguard for workers against employers' abuse and it has some sympathy with the notion that any worker should be able to join a trade union (subject to the exceptions set out in Article 11 § 2 *in fine*). However, as pointed by the applicant, ASLEF represents all workers in the collective bargaining context and there is nothing to suggest in the present case that Mr Lee is at any individual risk of, or is unprotected from, any arbitrary or unlawful action by his employer. Of more weight in the balance is the applicant's right to choose its members. Historically, trade unions in the United Kingdom, and elsewhere in Europe, were, and though perhaps to a lesser extent today are, commonly affiliated to political parties or movements, particularly those on the left. They are not bodies solely devoted to politically-neutral aspects of the well-being of their members, but are often ideological, with strongly held views on social and political issues. There was no hint in the domestic proceedings that the applicant erred in its conclusion that Mr Lee's political values and ideals clashed, fundamentally, with its own. There is no indication that the applicant had any public duty or role conferred on it, or has taken the advantage of state funding, such that it may reasonably be required to take on members to fulfil any other wider purposes.

51. As regards the Government's assertion that domestic law would have permitted the expulsion of Mr Lee if the applicant had restricted its grounds to conduct not related to his membership of the BNP, the Court would note that the Employment Tribunal found that the applicant's objections to Mr Lee were primarily based on his membership of the BNP. It does not find it reasonable to expect the applicant to have used the pretext of relying purely on Mr Lee's conduct which was largely carried out by him as a member of, and reflected his adherence to the aims of, the BNP.

52. Accordingly, in the absence of any identifiable hardship suffered by Mr Lee or any abusive and unreasonable conduct by the applicant, the Court concludes that the balance has not been properly struck and that the case falls outside any acceptable margin of appreciation.

53. There has, accordingly, been a violation of Article 11 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Costs and expenses

55. The applicant sought only costs and expenses incurred both within the domestic legal system to obtain redress for the violation and before this Court. It claimed for the two Employment Tribunal hearings GBP 11,958.31 and for the Employment Appeal Tribunal proceedings GBP 12,799, both sums inclusive of value-added tax (VAT). It claimed for the Strasbourg proceedings, GBP 17,343, also inclusive of VAT, which included GBP 393 for solicitors, GBP 10,868.75 for senior counsel, GBP 4,993.75 and GBP 1,057, respectively, for the two junior counsel. Sums were also claimed for estimated future proceedings.

56. The Government argued that, as in the employment proceedings costs did not follow the event and that even if successful the applicant would have had to bear the expense of vindicating its rights, such costs should not be recoverable in Strasbourg. They also asserted that as the applicant had ample grounds on which it could have expelled Mr Lee, the proceedings had been entirely avoidable. Further as the proceedings were less formal than ordinary court proceedings and it was commonplace for parties to proceed without legal representation (as Mr Lee did), it was the applicant's choice to be represented and its instruction of a Queen's Counsel was disproportionate and the Government should not have to meet those costs, particularly where it failed to press its Article 11 claims and those aspects of the case were not involved in the second tribunal proceedings.

57. The Government submitted, as regarded Strasbourg costs, that the sums claimed by the applicant who had instructed three counsel were excessive. They considered 50% of the amount claimed would be reasonable. They also disputed the amount of possible future costs.

58. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, 25 March 1999, § 79, and *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 28, ECHR 2000-IX). This may include domestic legal costs actually and necessarily incurred to prevent or redress the breach of the Convention (see, for example, *I.J.L., G.M.R. and A.K.P. v. the United Kingdom (Article 41)*, nos. 29522/95, 30056/96 and 30574/96, § 18, 25 September 2001).

59. Concerning, first, the domestic proceedings, the Court would note that it is not at all uncommon for courts and tribunals within Contracting States not to adopt the approach of costs following events. According to its long-established practice, where an applicant has, in such proceedings, incurred costs as a direct result of seeking redress for, or to prevent a, breach of his or

her rights, these may be regarded as a financial loss flowing from that breach and thus recoverable in Strasbourg proceedings, regardless of whether these could have been reimbursed at the domestic level. The Court has already rejected above the Government's argument that the applicant was in some way responsible for provoking the proceedings through its own conduct and it does not find it unreasonable, in a matter of vital concern, that it instructed senior counsel. Nor are the sums claimed here unreasonable. The Court has also found that the applicant did not fail, as alleged, to raise his Convention claims before the tribunals and even if, pursuant to the Employment Appeal Tribunal decision the Article 11 point was not considered by the second Tribunal, this does not detract from the fact that it was that Tribunal's decision which finally decided that the applicant had acted contrary to section 174 in expelling Mr Lee and thus rendered the applicant a victim of a breach of Article 11 as found above. The Court awards the sum claimed, namely 38,900 euros (EUR) (*equivalent approx. GBP 24,757.31*), inclusive of VAT.

60. Turning to the Strasbourg costs, noting the relative lack of complexity of the proceedings before it and the awards made in comparable cases, and agreeing with the Government that the instruction of three counsel led to an unnecessary duplication of work, the Court awards EUR 15,000 (*approx. GBP 10,000*), inclusive of VAT.

B. Default interest

61. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 11 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 53,900 (fifty three thousand nine hundred euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 February 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Josep CASADEVALL
President

ANNEX B

List of Consultees

Below is a list of organisations that were sent the consultation document:

<p>AA Democratic Union ACAS ACCORD Advertising Producers' Association AEGIS The Aegon UK Staff Association Alliance and Leicester Group Union of Staff Ambulance Service Union Amicus (UNITE) ANGU - Abbey National Group Union Associated Chiropractors & Podiatrists Associated Society of Locomotive Engineers & Firemen Associated Train Crew Union Association for College Management Association of British Orchestras Association of Cambridge University Assistants Association of Circus Proprietors of Great Britain Association of Educational Psychologists Association of Flight Attendants Association of Indian Banks in the UK Association of Licensed Aircraft Engineers (1981) Association of Local Authority Chief Executives Association of London Government Association of Management and Professional Staffs Association of Plastic Operatives and Engineers Association of Plumbing and Heating Contractors Association of Principal Fire Officers Association of Professional Ambulance Personnel Association of Professional Music Therapists in Great Britain Association of Professionals in Education & Children's Trusts Association of Revenue and Customs Association of School & College Leaders</p>	<p>Association of Somerset Inseminators Association of Teachers and Lecturers Audit Commission Staff Association Bakers, Food and Allied Workers' Union Balfour Beatty Group Staff Association Better Regulation Commission Bevans Solicitors Birmingham Law Society Birmingham Union of Club Stewards Birmingham Wholesale Fresh Produce Association Boots Pharmacists' Association (BPA) Britannia Staff Union British Air Line Pilots Association British Association of Colliery Management British Association of Dental Nurses British Association of Journalists British Association of Occupational Therapists Limited British Clothing Industry Assoc. Ltd British Dental Association British Dietetic Association British Exhibition Contractors Assoc. British Glove Association British Marine Federation -East Anglia British Medical Association British Metals Federation British Printing Industries Federation British Retail Consortium British Union of Social Work Employees Broadcasting, Ent., Cinematograph & Theatre Union Builders Merchants Federation Business Services Association Card Setting Machine Tenters Society Certification Officer Central Arbitration Committee Chartered Institute of Personnel and Development Chartered Society of Physiotherapy Cheshire Building Society Staff Association City Screen Staff Forum Communication Workers Union</p>
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<p>Community - the union for life Community & District Nursing Association Community and Youth Workers' Union Confederation of British Industry CONNECT Construction Confederation Construction Plant Hire Association Co-operative Employers' Association Derbyshire Group Staff Union Diageo Staff Association Directors Guild of Great Britain Distribution Staff Association Dunfermline Building Society Staff Association East of England Regional Assembly Educational Institute of Scotland Electrical Contractors Association of Scotland Employers Forum on Statute and Practice Employers in Voluntary Housing Limited Employers' Organisation for Local Government Employment Appeal Tribunals Employment Law Bar Association Employment Lawyers Association Employment Relations Services Employment Tribunals Service Engineering Construction Industry Association Engineering Employers' East Anglian Association Engineering Employers' Federation (EEF) Engineering Employers' Sheffield Association (South Yorkshire and North Midlands) Engineering Officers Technical Association England and Wales Cricket Board Limited Equity Eversheds Solicitors FDA Federation of Professional Railway Staff Federation of Small Businesses Federation of Window Cleaners Fire Brigades Union Fire Officers Association Forum for Private Business G4S Justice Services Staff Association Gallaher Sales Staff Association General Dental Practitioners Association</p>	<p>General Federation of Trade Unions General Union of Loom Overlookers Glass and Glazing Federation GMB Greater London Authority Guild of Professional Teachers of Dancing Hammonds Solicitors Harrods Staff Union Heating and Ventilating Contractors Association HM Prison Service Home Office Hospital Consultants and Specialists Association Hyde and District Textile (Technicians and Operatives) Association Ice Hockey Players Association (Great Britain) Immigration Service Union Independent Federation of Nursing in Scotland Independent Pilots Federation Institute of Directors Institute of Football Management and Administration Institute of Journalists International Labour Office Irish Bank Officials Association IRS Employment Review Lancashire Textile Manufacturers Association Lancaster, Morecambe and South Lakeland Master Plumbers Association Law Society Lawson Mardon Star Ltd Managerial Staff Association Leather Producers' Association Lecturers Employment Advice and Action Fellowship Leeds and Holbeck Building Society Staff Association Leek United Building Society Staff Association Lloyds TSB Group Union Local Government Association Local Government East Midland Local Government Yorkshire and Humber Locum Doctors' Association Low Pay Unit Malt Distillers Association of Scotland</p>
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<p>Mastic Asphalt Council Mid-Anglia Engineering Employers' Association Musicians' Union NAPO National Association of Colliery Overmen Deputies and Shotfirers (South Wales Area) National Association of Colliery Overmen, Deps & Shotfirers National Association of Colliery Overmen, Deputies and Shotfirers (Scottish Area) National Association of Co-operative Officials National Association of Farriers Blacksmiths and Agricultural Engineers National Association of Head Teachers National Association of NFU Group Secretaries National Association of Schoolmasters Union of Women Teachers National Car Park Workers Union National Employers Organisation for Local Government Services National Farmers' Union National Farmers' Union Staff Association National Federation of Retail Newsagents National Federation of Sub-Postmasters National Fillings Association National Hairdressers' Federation National Health Service National House Building Council Staff Association National Joint Industrial Council for the Slag Industry National Pharmacy Assoc. Ltd National Sawmilling Association National Society for Education in Art and Design National Trainers Federation National Union of Journalists National Union of Mineworkers National Union of Rail, Maritime & Transport Workers National Union of Teachers Nationwide Group Staff Union Nautilus UK Nestle Field Sales Staff Association NISA North East Regional Employers' Organisation for Local Authorities</p>	<p>North of England Zoological Society Staff Association Offshore Industry Liaison Committee Paper Federation of Great Britain Ltd PCS Portman Staff Association Prison Governors Association Prison Officers' Association Prison Service Union Prison Staff Association Producers Alliance for Cinema and Television Professional Association of Cabin Crew Employees Professional Association of Teachers Professional Cricketers Association Professional Footballers' Association Professional Rugby Players Association Prospect Publishers Association Recruitment and Employment Confederation Retail Book Stationery and Allied Trades Employees Association Retail Motor Industry Federation Retained Firefighters Union Retired Officers Association Royal College of Midwives Royal College of Nursing RSPB Staff Association Scarborough Building Society Staff Association (SOCASS) Scottish and Northern Ireland Plumbing Scottish Carpet Workers Union Scottish Decorators Federation Scottish Engineering Scottish Grocery Trade Employers Association Scottish Newspaper Publishers Association Scottish Pharmaceutical Federation Scottish Print Employers Federation Scottish Secondary Teachers Association Scottish TUC Sheffield Wool Shear Workers Union Shield Guarding staff Association Skipton Staff Association Small Business Council Smithfield Market Tenants' Association Society of Authors Limited Society of Chiropodists and Podiatrists Society of Local Council Clerks Society of Radiographers</p>
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<p>Society of Registration Officers (Births, Deaths and Marriages)</p> <p>South East Employers</p> <p>South Western Provincial Employers Organisation</p> <p>Stable Lads Association</p> <p>Staff Association of Bank of Baroda (UK Region)</p> <p>Staff Union West Bromwich Building Society</p> <p>The Association for Clinical Biochemistry</p> <p>The Association of Newspapers and Magazine Wholesalers</p> <p>The Bar Council</p> <p>The British Amusement Catering Trades Ass.</p> <p>The British and Irish Orthoptic Society</p> <p>The British Chambers of Commerce</p> <p>The British Lace Federation</p> <p>The British Lock Manufacturers' Assoc.</p> <p>The British Precast Concrete Fed. Ltd</p> <p>The Cinema Exhibitors' Association Ltd</p> <p>The Construction Confederation</p> <p>The Electrical Contractors Association</p> <p>The Employers' Federation of Textile Finishers</p> <p>The Federation of Dredging Contractors</p> <p>The Federation of Master Builders</p> <p>The Labour Relations Commission</p> <p>The Law Society Scotland</p> <p>The National Association of Master Bakers</p> <p>The National Probation Service</p> <p>The Newspaper Society</p> <p>The Showmen's Guild of Great Britain</p> <p>The Vehicle Builders and Repairs Association Limited</p> <p>Thermal Insulation Contractors Assoc.</p> <p>Trades Union Congress</p> <p>Transport & General Workers Union (UNITE)</p> <p>Transport Salaried Staffs' Association</p> <p>Twenty first (21st) Century Aircrew UBAC</p> <p>UCU - The University & College Union</p> <p>Undeb Cenedlaethol Athrawon Cymru</p> <p>Union of Construction, Allied Trades & Technicians</p> <p>Union of Country Sports Workers</p> <p>Union of Democratic Mineworkers</p> <p>Union of DHL Workers</p> <p>Union of Federation of Employed Door Supervisors and Security</p> <p>Union of Finance Staff</p> <p>Union of General & Volunteer Workers</p>	<p>Union of Shop, Distributive & Allied Workers</p> <p>UNISON</p> <p>United and Independent Union</p> <p>United Road Transport Union</p> <p>Unity</p> <p>University of the West of England (Stephanie Tailby, secretary of the British Universities' Industrial Relations Association)</p> <p>Wales TUC</p> <p>Warwick International Staff Association</p> <p>Welsh Rugby Players Association</p> <p>West Midlands Local Government Association</p> <p>Whatman Staff Association</p> <p>Working Lives Research Institute</p> <p>Writers' Guild of Great Britain</p> <p>Yorkshire Glass Manufacturers Association</p> <p>Yorkshire Independent Staff Association</p>
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ANNEX C

Code of Practice on Consultation

The Consultation Code of Practice Criteria:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The complete code is available on the cabinet Office's web site, address www.cabinetoffice.gov.uk/regulation/consultation/code/index.asp

Comments or complaints:

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Simon Towler
Consultation Co-ordinator
Better Regulation Team
Department of Trade and Industry
1 Victoria Street
London SW1H 0ET

Telephone: 0207 215 1964
Email: Simon.Towler@dti.gsi.gov.uk



Partial Regulatory Impact Assessment

Employment Relations Directorate

Trade unions' rights to expel members

April 2007

Purpose and intended effect

Objectives

1. On 27 February 2007, the European Court of Human Rights (the "Court") issued a judgment in the case of *Aslef v The United Kingdom* (Application no 11002/05). The case concerns the freedom of trade unions under GB law to expel or exclude individuals on the grounds of their political party membership, and the Court concluded that the relevant part of GB law violated Article 11 of the European Convention on Human Rights (the "Convention"). The UK Government does not intend to appeal the judgment, and recognises that the relevant part of trade union law in this country should be amended to ensure compatibility with the Convention. The UK Government therefore concludes that those aspects of section 174 of the 1992 Act which refer to political party membership and activities need to be changed to ensure complete compliance with Article 11.

Background

2. Under the law, any individual who wishes to join or remain a member of a trade union has the right to do so. The union may exclude or expel that person only for one of a number of permitted reasons. Those reasons are set out in section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the "1992 Act"). One of them is that the person's "conduct" is unacceptable.

3. Section 174 sets out categories of conduct, jointly classified as "excluded conduct", for which it is always unlawful for a union to expel or exclude a person. It also establishes a further category of conduct called "protected conduct", which it defines as "current or former membership of a political party". It is unlawful for a union to exclude or expel a person wholly or mainly on the grounds of that person's "protected conduct". However, Section 174 explicitly states that the "political activities" of a person do not constitute "protected conduct". The net effect of these provisions is to provide some scope for a union lawfully to expel or exclude political extremists on the basis of their political activities such as standing for political office or campaigning on behalf of a political party.

4. According to the Court, trade unions must be given greater autonomy to decide whether the political party membership of individuals should debar them from belonging to the union.

5. The UK Government does not intend to appeal the judgment, and recognises that the relevant part of trade union law in this country should be amended to ensure compatibility with the Convention. The UK Government therefore concludes that those aspects of section 174 of the 1992 Act which refer to political party membership and activities need to be changed to ensure complete compliance with Article 11.

Consultation

6. The Government is now undertaking a three month public consultation on its proposed approach to ensuring that the relevant parts of section 174 of the 1992 Act are compliant with Article 11.

Options

7. A summary of proposed options is set out below:

Option 1: Amend Section 174 to ensure there is no explicit reference to a special category of conduct relating to political party membership or activities.

Option 2: Retain the special category of conduct relating to political party membership and activities but significantly amend the rights not to be excluded or expelled for such conduct.

Discussion of options

8. **Option 1** would in effect position political party membership and activities under the general heading of "conduct" (which was the situation before the Trade Union Reform and Employment Rights Act 1993 was implemented). Where such political party membership or activities were "unacceptable" to the trade union, it would therefore be lawful for the union to expel or exclude on those grounds. This option would provide trade unions with much greater autonomy in deciding their membership. However, there would be no special safeguards against possible abuse. Such safeguards may not be necessary in any event: there is no evidence that trade unions would make use of this greater freedom by expelling members or activists of mainstream political parties. Also, if a trade union acted outside its rules when expelling a member, then that person could seek legal redress by bringing a breach of rule claim before the courts.

9. **Option 2** would refer to the limited conditions under which it would remain unlawful for the trade union to exclude or expel an individual on the grounds of their political party membership or activities. Those conditions would specify that the union's decision would be unlawful unless the political party membership or activity concerned was incompatible with a rule or objective of the union, and the decision to exclude or expel was taken in accordance with union rules or established procedures.

10. **Option 2** would specify particular safeguards against potential abuse. Those safeguards are based on the reasoning of the Court which noted the need for the trade union to avoid arbitrary behaviour and to act transparently in accordance with its rules. Many union rule books now refer to racist, xenophobic or extremist political behaviour as unacceptable to the union. So, little adaptation by those trade unions would be needed in order to comply with this option. Where a trade union was required to amend its rule book, then members and potential members should gain because they would be properly informed of the potential consequences of their political actions. **Option 2** might, however, create grey areas and give scope for legal action to arise about the precise meaning of a union's rules or objectives.

Costs and benefits

11. There is no firm information on the number of people expelled by trade unions for their political activities each year. Nor is there data on the potential number of union members who would face expulsion if unions felt able to expel them for their political affiliations. These figures are likely to be low. That view is supported by the fact that the number of Employment Tribunal claims that are lodged against unions for wrongful expulsions is very small. This provides some indication that the proposed change in the law will not result in a significant rise in the number of expulsions from unions.

Analysis of benefits

12. **Options 1 and 2** are similar in their intended effect and so the benefits from both are also similar. Both options allow trade unions a wider ability to expel members whose political affiliations are contrary to a union's principles. There are few monetary benefits that flow from this, although to the limited extent that unions currently have to engage in legal proceedings where they are challenged over expulsions they may benefit from some reduction in these sorts of costs.

13. There may also be some intangible benefits to union members from both options, in ensuing that disruptive individuals whose political views are abhorrent to them are no longer involved in the trade union. This should also ensure the smoother running of the union's affairs for all concerned.

Analysis of costs

14. Both **options 1 and 2** should impose minimal costs on unions, as any expulsions they might make would be voluntary. However **option 2** may necessitate that some unions examine their rule-books to ensure they were sufficient to deal with any expulsion situations that might arise. It is also possible that **option 2** may allow some scope for legal action to arise about the precise meaning of a union's rules or objectives.

15. For union members or potential members, the only costs would be felt by those who either were expelled for their membership of political groups or by those members who left their membership of a political group to remain in a union. To any individual these costs could be significant but given the

numbers affected are likely to be very small, the overall size of the intangible costs would be low.

Small Firms Impact Test

16. The proposed regulatory changes impact upon unions and their members and will have no significant effect on firms.

Competition assessment

17. The proposed regulatory changes impact upon unions and their members and will have no significant effect on firms or competition.

Enforcement, sanctions and monitoring

18. These rights are currently enforced via the employment tribunal system. The Government is not proposing any change to the method of enforcement or to the remedies.

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