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Article 11 in the Mirror: The Importance of Section 2 Human Rights Act 1998 in Understanding the Courts' Approach to Article 11 of the European Convention on Human Rights

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ABSTRACT

Most labour lawyers would agree that Article 11 of the European Convention on Human Rights (ECHR) has had a limited impact on collective labour law in the UK. This article argues that an important factor explaining the domestic courts' cautious approach in Article 11 cases is their treatment of the case-law of the European Court of Human Rights (ECtHR). Section 2 HRA requires courts to 'take into account' ECtHR decisions, a phrase which has been interpreted in leading cases such as *Ullah* and *Elan-Cane* to mean that the Strasbourg case-law should be treated as both a floor and a ceiling in terms of the protection to be afforded to Convention rights in domestic law. It is easy to overlook the significance of this case-law because it is rarely referred to by the domestic courts when deciding Article 11 claims. However, despite the lack of explicit judicial analysis, the Article 11 case-law is wholly orthodox in its application of the general approach to s. 2. As a result, the courts have limited capacity to 'go beyond' the Strasbourg case-law, decide issues where Strasbourg gives the state a margin of appreciation, or engage in anything other than incremental development. Understanding the role played by s. 2 helps to explain many of the disappointing outcomes we have seen. It also has important implications for the kinds of Article 11 cases that are worth pursuing and for the way in which they should be framed.

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1. INTRODUCTION

The Human Rights Act 1998 (HRA) entered into force in 2000, so we now have over 20 years' experience of case-law in which attempts have been made to persuade the UK courts that various aspects of the legislation governing trade unions, collective bargaining and industrial action are in breach of Article 11 of the European Convention on Human Rights (ECHR), and should either be interpreted to render them compatible, using s. 3 HRA, or be made the subject of a declaration of incompatibility under section 4. Most labour lawyers would agree that the results of this litigation have been rather disappointing from a worker-protective perspective. The UK's complex minefield of balloting and notice requirements as preconditions to industrial action has been left largely untouched by Article 11 challenges.[1] Rules precluding unions from bringing recognition claims when the employer has recognised another union, even if it is not an independent union engaged in bargaining about pay and conditions, remain in force.[2] And the recognition procedure only applies to those working people who can show that they are in an 'employment relationship'.[3]

In this article, I re-examine the Article 11 cases through the lens of section 2 HRA. I argue that this provision should be given much greater prominence in explaining why the courts decide Article 11 cases as they do, and therefore why this body of case-law has not brought about radical change in the landscape of collective labour law in the UK.

Section 2 HRA requires domestic courts to 'take into account' decisions of the European Court of Human Rights (ECtHR). While the basic idea behind s. 2 is uncontroversial, the courts have used it as the basis for the so-called 'mirror' principle, articulated in leading cases such as *Ullah*[4] and *Elan-Cane*.[5] The 'mirror' principle requires the domestic courts to provide an equivalent level of human rights protection to that found in the Strasbourg jurisprudence. This has three elements: 'keeping pace' with ECtHR decisions, not 'going beyond' ECtHR decisions, and engaging in incremental developments only. Although the first of these elements should ensure that

[1] Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), ss. 219–235.
[2] TULRCA, Schedule A1, para 35.
[3] *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2023] UKSC 43, [2024] ICR 189 ('Deliveroo').
[4] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.
[5] *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 559.

domestic law offers as good a level of protection as Strasbourg,[6] the other two elements significantly limit the domestic courts' opportunity to offer their own expansive or creative interpretations of Convention rights. I explain the 'mirror' principle in more detail in Section 2, drawing on the public law and human rights literature.

Surprisingly, the Article 11 cases rarely discuss section 2 HRA or engage in detail with the leading cases setting out the 'mirror' principle. There is a brief discussion of *Elan-Cane* in 'Deliveroo', but apart from that, the section 2 jurisprudence is largely ignored.[7] This may explain why section 2 has not been much discussed in the labour law literature either. Nevertheless, I demonstrate in Section 3 that the Article 11 cases can be classified and analysed as relatively straightforward applications of the three different elements of the 'mirror' principle.

Giving greater prominence to section 2 in the analysis generates two important insights. First, some types of challenge are doomed to fail because of the constraints imposed by section 2. For example, because section 2 does not permit the courts to 'go beyond' the Strasbourg jurisprudence, there would be little point in bringing a domestic challenge to the statutory ban on secondary industrial action. The ECtHR held in *RMT* that the UK's position on secondary action, although out of line with ILO standards and the position in most other Council of Europe states, was not a breach of Article 11.[8] Although this decision has, rightly, been the subject of intense criticism, section 2 means that it is simply not open to the domestic courts to 'go beyond' *RMT*.[9] Second, a greater focus on section 2 helps to explain why so much of the focus of judicial decisions is on examining the previous case-law of the Strasbourg court, rather than on a broader examination of what a particular right might entail. For example, for most labour lawyers, the issue in *Mercer* is relatively straightforward: the absence of any protection against detriment for a worker taking part in lawful strike action was a significant and unjustified lacuna in the law.[10] While the Supreme Court ultimately reaches that same conclusion, large parts of the decision are (as I explain further below) devoted to trying to unpick alleged distinctions in the ECtHR case-law between public and private sector workers

[6] As I explain below, the reality is somewhat more complex.

[7] Above n.3, [130].

[8] *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10.

[9] For critique, see, eg A. Bogg and K.D. Ewing, 'The Implications of the *RMT* Case' (2014) 43 *ILJ* 221; K.D. Ewing and J. Hendy, 'Article 11(3) of the European Convention on Human Rights' [2017] *EHRLR* 356.

[10] *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12, [2024] ICR 814.

and among core, essential and accessory elements of the right to strike.[11] The common lawyer's search for the ratio of previous decisions is a dominant feature of the reasoning process.

While these insights are interesting in themselves, they also have important implications for strategic litigation. They suggest which kinds of Article 11 cases are worth pursuing and, perhaps more importantly, which are not, and how they should be framed. I return to these points in Section 4.

2. SECTION 2 HRA AND THE 'MIRROR' PRINCIPLE

Under section 2, domestic courts are directed to 'take into account' the Strasbourg case-law. This phrase has proved surprisingly difficult to interpret.[12] The drafters' intention was to achieve an apparently straightforward objective: to ensure that domestic courts considered the Strasbourg case-law, without making it binding precedent in a domestic sense. This would help to reduce the need for claimants to go to Strasbourg to vindicate their rights – fulfilling the Act's aim to 'bring rights home'[13] – whilst giving the courts some freedom to interpret the Convention rights without having formally to distinguish ECtHR decisions. In practice, however, as one commentary puts it:

> … the domestic courts have adopted the view that the purpose of section 2 is to ensure that the same Convention rights are enforced under the Human Rights Act as would be enforced by the Strasbourg Court and that section 2 does not permit courts to adopt an autonomous domestic meaning of Convention rights.[14]

Graham helpfully breaks down this general idea of 'following Strasbourg' into three further principles:[15]

- 'keeping pace' with Strasbourg: where there is clear ECtHR case-law to the effect that something is a breach of a Convention right, the domestic

[11] For discussion, see A. Bogg, 'Bringing the Right to Strike Home: *Secretary of State for Business and Trade v Mercer* – Part 1' and 'Bringing the Right to Strike Home: *Secretary of State for Business and Trade v Mercer* – Part 2', Oxford Human Rights Hub Blog, 10 May 2024; I. Katsaroumpas, '*Secretary of State for Business and Trade v Mercer*: An Unqualified Victory for the Right to Strike?' UK Labour Law Blog, 7 June 2024; A. Sanders, 'Extending Statutory Protection to Action Short of Dismissal for Participating in Industrial Action: the Supreme Court on the Right to Strike in *Secretary of State for Business and Trade v Mercer*' (2024) 53 *ILJ* 762.

[12] Lord Irvine of Lairg, 'A British Interpretation of Convention Rights' [2012] *PL* 237, 238.

[13] Home Office, *Rights Brought Home: the Human Rights Bill* (October 1997; CM 3782).

[14] J. Wadham et al, *Blackstone's Guide to the Human Rights Act 1998* 8th edn. (Oxford: OUP 2024), 67.

[15] L. Graham, 'Taking Strasbourg Jurisprudence into Account' [2022] *EHRLR* 163.

courts should normally follow that case-law and find a breach, unless there is a good reason to enter into a 'dialogue' with the Strasbourg court.

- 'not going beyond' Strasbourg: where there is clear ECtHR case-law to the effect that something is not a breach of a Convention right, the domestic courts should normally follow that case-law and find no breach. This rule applies even where the Strasbourg court has found that the state is not in breach because it is within its margin of appreciation: in other words, the making of choices within the margin of appreciation is a matter for the executive and the legislature, not the courts.

- incremental developments only: where there is no clear ECtHR case-law on the point, the domestic courts should not advance their own interpretation or application of the Convention right, but should focus instead on predicting how the Strasbourg court would decide the case, drawing on existing principles and related case-law. Any developments made by the domestic courts under this heading should be incremental only.

I examine each of these principles in turn.

A. Keeping Pace With Strasbourg

The basic idea that the UK courts should 'keep pace' with Strasbourg can be traced back at least to *Alconbury*.[16] Lord Slynn said this about the ECtHR's case-law:

> In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence.[17]

The phrase 'keeping pace' itself comes from the well-known decision in *Ullah*, in which the House of Lords articulated what has become known as the 'mirror' principle (emphasis added):

> The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, *but certainly no less*.[18]

The rationale for this approach, as articulated in the quotation from Lord Slynn's judgment, is reflective of the idea of 'bringing rights home': to

[16] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295.

[17] Ibid [26].

[18] Above n 4, [20].

save claimants the time and cost of a trip to Strasbourg when the outcome is inevitable. But the 'clear and constant' caveat is an important one. In order to manage its vast case-load, the ECtHR now commonly sits in Chambers of seven judges, with decisions of the Grand Chamber of 17 judges carrying more weight. Although the Court aims to decide cases in a broadly consistent way, the proliferation of Chambers and the sheer volume of cases can result in inconsistencies, and the Court does not approach its previous case-law in the same way that a common law court would.[19] The intention behind this element of the 'mirror' principle is that the UK courts should look either for a clear pronouncement from the Grand Chamber or for *lines* of Strasbourg case-law to follow, and there are many examples of cases in which these requirements have been held not to be satisfied.[20]

The application of the 'keeping pace' approach has meant that the UK courts have sometimes found a violation of a Convention right when they might not otherwise have done so. One example is *Manchester City Council v Pinnock*, in which the Supreme Court declined to follow three relatively recent decisions of the House of Lords relating to the application of Article 8 in possession cases.[21] Although the domestic position was becoming more controversial, with dissents in some of the cases, it is not clear that the judges would have taken this dramatic step without the prompting of the Strasbourg court.

But there are well-known counter-examples in which the UK courts have declined to follow Strasbourg, even when there is a clear line of authority, because they consider that line of authority to be flawed. This is expressly contemplated in the formulation adopted in the *Pinnock* case (emphasis added):

> Where, however, there is a clear and constant line of decisions *whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle*, we consider that it would be wrong for this court not to follow that line.[22]

[19] *DSD v Commissioner of Police of the Metropolis* [2018] UKSC 11, [2019] AC 196, [143] (Lord Mance).

[20] E.g. *Poshteh v Kensington and Chelsea RLBC* [2017] UKSC 36, [2017] AC 624.

[21] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104. The three cases were: *Harrow LBC v Qazi* [2003] UKHL 43, [2004] 1 AC 983, *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465, and *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] AC 367.

[22] Ibid [48].

A well-known example is the *Horncastle* case, where the domestic courts refused to accept Strasbourg's criticisms of rules on hearsay evidence.[23] This case and other examples were cited with approval by Lord Mance in *DSD*, who noted that a 'healthy dialogue' with the Strasbourg court might then take place.[24] A more accurate statement of this element of the so-called 'mirror' principle might be that the courts should 'keep pace' unless they disagree.[25]

B. Not Going Beyond

The other aspect of the 'mirror' principle articulated in *Ullah* is that the ECtHR's case-law should be seen as setting the upper limit of the protection domestic courts should provide: '*no more*, but certainly no less'.[26] Claimants who would not win in Strasbourg, because the ECtHR has found no violation in a similar case, do not have the opportunity of persuading the domestic court to decide differently. This is controversial because the domestic court would be offering a *higher* level of human rights protection in this situation, so this would seem to be easier to justify than the *Horncastle* exception.[27]

Some of the earlier cases on this issue appear to have taken a bolder view. In *McLaughlin*, the claimant challenged a rule providing a benefit to surviving spouses but not to the surviving partner in an unmarried couple as a breach of Article 8 taken with Article 14.[28] The Supreme Court distinguished the case of *Shackell v UK*, in which a similar claim had been rejected by the ECtHR.[29] Although the judges noted that the benefit at issue in *McLaughlin* was intended to support the surviving parent in looking after the children of the relationship, there were also children present in the *Shackell* case, so the difference between the two cases was quite slight. The Supreme Court nevertheless upheld the declaration of incompatibility that had been granted at first instance. Similarly, it is possible to find examples of older cases in which the Strasbourg court had allowed a margin of appreciation to the national authorities, and the domestic court had taken its own decision within the margin. The most obvious example of this is *Nicklinson*, in which the Supreme Court held by a majority that it could decide whether

[23] *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373.
[24] Above n.19, [152].
[25] For a helpful discussion and critique, see Graham, above n.15, 168–170.
[26] Above n.4, [20].
[27] Graham, above n.15, 170.
[28] *McLaughlin's Application for Judicial Review* [2018] UKSC 48, [2018] 1 WLR 4250. See also *DSD*, above n.19, [153] (Lord Mance).
[29] *Shackell v UK*, 27 April 2000.

the criminal offence of assisting suicide under section 2 Suicide Act 1961 infringed Article 8 ECHR, a matter which the ECtHR regarded as being within the margin of appreciation, though it did not issue a declaration of incompatibility in the circumstances of the case.[30]

More recently, however, the Supreme Court in *Elan-Cane* appears to have rejected both the idea that the domestic court can find a violation where Strasbourg has not, and the idea that the domestic court can decide within the margin of appreciation.[31] The claimant in *Elan-Cane* challenged the government's decision to refuse to issue them with a passport that did not require them to identify as either male or female. It was held that Article 8, as interpreted by the ECtHR, did not place a positive obligation on the Secretary of State to issue such a passport. However the claimant challenged the Supreme Court to make its own decision on the point. After a lengthy discussion of previous case-law on the relationship between the domestic and ECtHR interpretations of the Convention, the Supreme Court concluded that it would not be appropriate for it to do so, for two main reasons. First, the HRA intends to give effect to the Convention rights in domestic law, so that the domestic interpretation should track the ECtHR's interpretation quite closely.[32] Second, where there is a margin of appreciation, it is not for the courts to make decisions within it:

> Contracting states can of course create rights going beyond those protected by the Convention, but that power exists independently of the Convention and the Human Rights Act, is not dependent on the margin of appreciation doctrine, and is exercisable in accordance with long-established constitutional principles, under which law-making is generally the function of the legislature.[33]

While this last point is clearly generally true as a matter of constitutional law, there might be cases in which the courts themselves are the institution best placed to act: questions around the application of procedural fairness in civil or criminal litigation might be an example. It seems unlikely, however, that many Article 11 cases—given their political, social and economic significance—would be seen as matters within the domain of domestic courts, so this need not detain me here.

[30] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657. See also *In re G (Adoption)* [2008] UKHL 38, [2009] 1 AC 173.
[31] Above n.5.
[32] Ibid [87].
[33] Ibid [85].

The courts' refusal to contradict the ECtHR by finding a violation where it would not (either because of the margin of appreciation or more generally) stands in contrast to their willingness to contradict the ECtHR by finding no violation where it would do so, and is clearly frustrating for litigants. There is a strong argument that dialogue between the UK courts and the ECtHR is equally beneficial in both sets of circumstances.[34] In particular, it might be argued that the UK is, in some respects, a more liberal and rights-friendly jurisdiction than some other Council of Europe states, so the courts could play a leadership role in developing interpretations of rights, and should not be held back by the Court's need to accommodate a much more diverse range of jurisdictions. I return to some of these points below.

C. Incremental Developments Only

The third principle—that the courts should only develop beyond the Strasbourg case-law in incremental ways—comes as no surprise after the second principle, since it also reflects the perception that Convention rights should be given the same interpretation in domestic law as they are given by the Strasbourg court.

In a helpful analysis, Graham suggests that there are three possible interpretations of the principle: that the courts cannot advance beyond Strasbourg at all, that they can only do so where they predict that the ECtHR would do so faced with the same case, or that they can do so on their own initiative.[35] While some early cases took the first, extremely cautious view,[36] he suggests that most cases have now settled on the second approach. For example, in *Rabone*, the Supreme Court was called upon to decide whether the 'operational duty' to protect life under Article 2 of the Convention, originally developed in the *Osman* case,[37] was applicable in the case of a voluntary psychiatric patient.[38] This decision took place against a background of ECtHR case-law which had held that the operational duty did not apply to hospital patients generally, with an exception for psychiatric patients

[34] See, eg, (from very different perspectives) Lord Irvine of Lairg, 'A British Interpretation of Convention Rights' [2012] *PL* 237; J. Letwin, 'Strasbourg's Views on the Modern Mirror Principle: Shattering the Mirror?' [2023] *PL* 628.

[35] Graham, above n.15, 164–166.

[36] E.g. *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529, [34] (Lord Nicholls).

[37] *Osman v United Kingdom* (2000) 29 EHRR 245.

[38] *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [2012] 2 AC 72.

who were compulsorily detained. The Supreme Court found that voluntary psychiatric patients were similarly-situated in practice to those who were formally detained, and therefore that 'the ECtHR would hold that the operational duty existed in this case'.[39] While some cases have advocated a bolder approach, the judges' comments have tended to be obiter. For example, in *DSD*, it was suggested that the courts not only could interpret Convention rights for themselves in this situation, but were positively obliged by section 6 HRA to do so.[40] However, there was a 'clear and constant' line of case-law to follow so the issue did not arise.

Lord Reed in *Elan-Cane* cited with approval the judgment in *AB*,[41] so this is probably the most accurate statement of the courts' current approach. It is worth quoting at length:

> It follows from these authorities that it is not the function of our domestic courts to establish new principles of Convention law. But that is not to say that they are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations that have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law … The application of the Convention by our domestic courts, in such circumstances, will be based on the principles established by the European court, even if some incremental development may be involved.[42]

The Supreme Court in *AB* specifically rejected counsel's argument that it should develop the law based on principles drawn from other international instruments and statements of their interpretive bodies to which the ECtHR might itself refer in reaching a decision.[43] This point is of particular significance in relation to Article 11 cases.

D. Conclusion

This necessarily brief overview has delineated the three main elements of the courts' current approach to section 2 HRA: 'keeping pace' with the Strasbourg court unless they disagree, 'not going beyond' its decisions (and not deciding within the margin of appreciation), and confining themselves to incremental developments only.

[39] Ibid [34].
[40] Above n.19, [73]–[79] (Lord Kerr).
[41] Above n.5, [101].
[42] *R (AB) v Secretary of State for Justice* [2021] UKSC 28, [2022] AC 487, [59].
[43] Ibid [60].

There is a large critical literature examining this body of doctrine, some of which was touched on above. There are at least three criticisms to be made. First, it is easier to persuade a domestic court to go against established Strasbourg case-law with which it disagrees (as in *Horncastle*[44]) than to persuade it to develop beyond that case-law. This has the counterintuitive result that it is easier to persuade courts to offer less protection to Convention rights than it is to persuade them to offer more protection.[45] Second, the close focus on the Strasbourg case-law and on predicting how the ECtHR might decide a similar case or develop the law means that there is less focus on the justification or otherwise for the proposed development. Technical reasoning plays a bigger role than normative argument.[46] Third, any scope for the UK courts to engage in dialogue with the ECtHR is confined to 'defending' particular elements of domestic law, rather than proposing advances in the understanding of rights. This limits the scope for domestic courts to play a leadership role.[47]

It seems likely that there are several different explanations for the judges' adoption – and recent reinforcement – of the cautious approach to section 2. Some commentators have argued that it is not for the domestic courts to lead the way in developing Convention rights, and doubtless some judges agree.[48] Judges steeped in the common law tradition are much more likely to be drawn to an incremental, gap-filling approach than to bold new developments. This is particularly so given the socially-contested nature of some rights claims. More recently, the judges may have been influenced by political debates around the future of the HRA and the UK's ratification of the ECHR, though the implications of these debates for the 'mirror' principle are complex.[49] It is a well-recognised phenomenon in the human rights law literature that judges take refuge in textual approaches when they feel that the legitimacy of human rights reasoning is being called into question.[50]

Although there is much to be said about the rights and wrongs of the section 2 case-law, the focus of this paper is on the relevance of that case-law to the courts' approach to Article 11 cases. With the exception of 'Deliveroo',

[44] Above n.23.

[45] Graham, above n.15.

[46] K Majewski, 'Mirroring the Margin' [2022] *PL* 553, 558–560.

[47] See references at n.34, above.

[48] See, eg P. Sales, 'Strasbourg Jurisprudence and the Human Rights Act: a Response to Lord Irvine' [2012] *PL* 253.

[49] A. Ramshaw, 'A Crack in the Mirror: Reclaiming the Human Rights Narrative from Strasbourg in Agenda Setting Theory and Legal Narrative' [2022] *EHRLR* 144.

[50] C. McCrudden, 'The Pluralism of Human Rights Adjudication' in L Lazarus, C. McCrudden and N. Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (Oxford: Hart 2014).

there has been very little engagement with this body of case-law in decisions on labour rights.[51] But, as the next section will demonstrate, the courts are clearly mindful of the correct approach to section 2 when interpreting and applying Article 11.

3. ARTICLE 11 IN THE MIRROR

My aim in this section is to classify the Article 11 cases in the domestic courts, following the structure used in the previous section (and in the public law literature more generally) to analyse the cases on section 2: finding a violation where the ECtHR has done so, not finding a violation where the ECtHR has not done so, and only making incremental developments where there is no clear ECtHR ruling on the point. What the analysis will demonstrate is that the domestic courts' approach to Article 11 has involved largely orthodox applications of section 2, despite the lack of discussion of section 2 'general principles' in most of the cases. This explains why so much of the reasoning in judgments is devoted to working out what the Strasbourg court has said on a particular point, rather than to general analyses of the meaning of freedom of association drawing on a wider range of sources. It also explains why it is relatively rare for the courts to find a breach of Article 11.

A methodological caveat is in order before we begin. The task of analysing the Article 11 case-law from a section 2 perspective is complicated by the fact that the section 2 case-law has not remained wholly static: as explained above, *Elan-Cane* represents a relatively recent return to a more conservative approach after dicta in some cases suggesting that the domestic courts could be more adventurous in their interpretations.[52] The same is, of course, true of the Article 11 case-law in Strasbourg. The decision in *Demir* in 2008 represented a major breakthrough because of the Court's recognition of collective bargaining as an 'essential element' of Article 11,[53] but the ruling in *RMT* in 2014 indicated that the Court's broadening out of Article 11 did not necessarily mean that it would be possible to mount a wholesale attack on the various limitations and restrictions on collective bargaining and industrial action in the UK.[54] I have sought throughout to

[51] Above n.7.
[52] Above n.5.
[53] *Demir v Turkey* (2009) 48 EHRR 54.
[54] Above n.8.

'match' the correct domestic approach to section 2 with the correct ECtHR approach to Article 11 at the time of the case under discussion.

A. Keeping Pace

The idea of 'keeping pace' with Strasbourg is that the courts should generally find a violation where the ECtHR has done so, provided that its jurisprudence is 'clear and constant' and betrays no fundamental misunderstanding of domestic law. To illustrate the application of this approach in the Article 11 case-law, at least three different types of decision might be relevant: a decision in which the Strasbourg case-law is followed in order to find a violation, a decision that the jurisprudence is not 'clear and constant', or a decision in which the jurisprudence is found to have misunderstood a fundamental feature of domestic law. The third type does not feature in domestic Article 11 cases at all, and there are only a few examples of the first two.

Probably the two clearest instances of the Strasbourg court finding a violation in relation to a provision of domestic law are *ASLEF*,[55] on the rules surrounding trade union membership, and *Wilson*, on inducements to give up collective bargaining.[56] Both cases led to changes in the relevant statutory provisions, and neither has given rise to much further litigation at the domestic level, despite the fact that both sets of statutory changes are not without their problems. However, it is possible to spot some indirect evidence of the 'keeping pace' approach in the Supreme Court's decision in *Kostal*.[57] In that case, the judges were called upon to interpret the provisions on inducements in a case in which the employer and the trade union had reached an impasse in negotiations and the employer had sought to bypass the union to implement a bonus payment.[58] The judges differed on the correct interpretation of the provisions and, as one might expect, there was little help to be derived from the Strasbourg case-law in determining the meaning of some complex domestic statutory drafting. However, it is clear from the judgments that the judges were aware of the background to the case and the need to ensure that the interests of trade unions were protected

[55] *Associated Society of Locomotive Engineers and Firemen (ASLEF) v United Kingdom* (2007) 45 EHRR 34.
[56] *Wilson v United Kingdom* (2002) 35 EHRR 20.
[57] *Kostal UK Ltd v Dunkley* [2021] UKSC 47, [2022] ICR 434.
[58] Trade Union and Labour Relations (Consolidation) Act 1992, s. 145B.

as the ECtHR had envisaged in *Wilson*.[59] In that limited sense, 'keeping pace' with Strasbourg formed part of the context for the case.

Another way to look for examples of 'keeping pace' would, of course, be to seek out cases in which the *domestic* courts have found a violation of Article 11. Such cases are rare, but there are a couple: the *Foster Carers'* case, and *Mercer*. The decision in *Mercer* is analysed further below as an example of incremental development: it does not follow any particularly clear Grand Chamber decision or line of case-law, but rather pieces together some principles from a range of different cases.[60] The *Foster Carers'* case will also reappear later when I consider decisions within the margin of appreciation, but for now it is worth noting that it could be seen as an example of 'keeping pace'.[61] The Court of Appeal applied the decision of the Grand Chamber in a Romanian case, *Pastorul cel Bun*, in order to find that the foster carers were in an 'employment relationship' for the purposes of Article 11.[62] The ECtHR's definition, which drew heavily on the ILO Employment Relationship Recommendation, applied regardless of the domestic classification of the relationship or its contractual status, and focused instead on the performance of work and the payment of remuneration, alongside some other criteria.[63] Applying this approach, the Court of Appeal found that the foster carers fell within the scope of Article 11. This meant that the refusal of the Certification Officer to 'list' their trade union and their lack of access to the Schedule A1 recognition procedure because they did not meet the domestic 'worker' definition were both violations of Article 11 (which the Court of Appeal also found were not justified by any legitimate aim). Of course, the same kind of argument was also made in 'Deliveroo', but without success.[64] This is best understood as the application of a different element of the 'mirror' principle, 'not going beyond', as I explain in the next section.

The requirement in the 'keeping pace' case-law for a decision of the Grand Chamber (as in the *Foster Carers'* case) or a 'clear and constant' line of case-law has been particularly relevant to attempts to challenge domestic legislation on industrial action. This can be illustrated by *Metrobus*.[65] An attempt was made

[59] Above n.57, [109]–[110].

[60] *Mercer*, above n.10.

[61] *National Union of Professional Foster Carers v Certification Officer* [2021] EWCA Civ 548, [2021] ICR 1397.

[62] *Sindicatul 'Pastorul cel Bun' v Romania* (2013) 58 EHRR 10.

[63] ILO, *Employment Relationship Recommendation* (No 198, 2006).

[64] Above n.3.

[65] *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, [2010] ICR 173. For discussion, see R Dukes, 'The Right to Strike under UK Law: Something More than a Slogan?' (2011) 40 *ILJ* 302.

by the trade union in that case to argue that the complex balloting and notice provisions in the 1992 Act were incompatible with Article 11. However, the case was decided in 2009, less than a year after *Demir* and only a few months after *Enerji*.[66] Lloyd LJ was not prepared to accept that the Strasbourg case-law recognised the right to strike as an 'essential element' of Article 11, noting that the judgment in *Enerji* was 'less fully articulated' than that in *Demir*.[67] However, he was prepared to consider whether the balloting and notice provisions at issue in the case amounted to disproportionate restrictions on the right to strike. This was done with a relatively light touch, noting that the state enjoyed a wide margin of appreciation (a point I return to below) and suggesting that the ECtHR would only find restrictions to be incompatible with Article 11 if they were extreme.[68] Emphasis was also placed on the need to strike a balance between the interests of workers and their employers (rejecting an argument presented on behalf of the union that restrictions were only justified to protect the democratic rights of workers themselves, not the rights of employers). Although there is no reference to the 'clear and constant' jurisprudence idea from the wider s. 2 case-law, it is easy to see how the Court of Appeal could have framed its concerns using that language. Since the time of *Metrobus*, of course, the right to strike has been recognised by the ECtHR on several occasions, including by the Grand Chamber.[69] However, the value of this development has been undermined by the Court's continuing refusal to decide whether the right to strike is an 'essential element' of Article 11, and by the wide margin of appreciation it allows to signatory states. The Court's reluctance to set standards in this area makes it difficult to point to rulings with which the domestic courts need to 'keep pace'.

B. Not Going Beyond

The 'not going beyond' Strasbourg case-law, like the 'keeping pace' case-law, may be evidenced by different types of decision: refusing to find a violation where Strasbourg has not done so; and refusing to decide within the margin of appreciation. I examine each in turn. The margin of appreciation has played a particularly significant role in the Article 11 jurisprudence so far.

Cases illustrating the point that the domestic courts should not find that there has been a violation when Strasbourg has not done so are,

[66] *Demir*, above n.53; *Enerji Yapi-Yol Sen v Turkey* (68959/01), 6 November 2009.
[67] Above n.65, [35].
[68] Above n.65, [50].
[69] See *RMT* (above n.8) and *Humpert v Germany* [2024] IRLR 222.

understandably, rare. There are not many ECtHR judgments involving the UK on which this principle can bite and, where there are such judgments, prospective claimants would generally be advised by counsel that it is not worth pursuing a case. But we can consider a hypothetical. The obvious one would be a challenge to the UK's ban on secondary industrial action. The ECtHR held in *RMT* that although this was an infringement of the claimants' rights, it was justified,[70] despite the fact that the ILO regards a complete ban as unacceptable and most other signatory states permit secondary action in some form.[71] Under the current approach to s. 2, there would be no point in attempting to revisit this issue in a domestic court. I explore in section 4, below, whether there is any scope for challenges on related points.

More significant in practice is the role played by the margin of appreciation. As explained in section 2, the rule here—strongly reinforced in the recent decision in *Elan-Cane*—is that where the Strasbourg court leaves a margin of appreciation to the national authorities, this is normally to be exercised by the executive and the legislature, rather than the courts.[72] Older cases suggesting that the courts could decide for themselves in these circumstances have been doubted. Two main examples illustrate the impact of the margin of appreciation on the domestic case-law: challenges to Schedule A1, and challenges to the rules on industrial action.

Although the Strasbourg case-law on collective bargaining has developed over time, particularly through the recognition of a right to collective bargaining in *Demir*, the domestic courts have placed considerable emphasis on the margin of appreciation throughout.[73] This has finally crystallised into the position articulated in 'Deliveroo': that because there is no requirement under Article 11 to have a recognition procedure at all, the decision to have one is an exercise of the state's discretion within the margin of appreciation.[74] Problems with the procedure itself are thus highly unlikely to amount to breaches of Article 11.

The role of the margin of appreciation prior to *Demir* is best illustrated by the *NUJ* case.[75] The NUJ challenged the CAC's decision to reject its

[70] Above n.8.

[71] E.g. Observation (CEACR)—adopted 2012, published 102nd ILC session (2013) on Convention No. 87, Freedom of Association and Protection of the Right to Organise Convention, 1948, on secondary action.

[72] Above n.5.

[73] Above n.53.

[74] Above n.3.

[75] *R (National Union of Journalists) v Central Arbitration Committee* [2005] EWCA Civ 1309, [2006] ICR 1.

application under Schedule A1, para. 35, because the employer had a recognition agreement with another, less representative, trade union. The rule was intended to prevent the recognition procedure from becoming 'bogged down' in disputes between unions, but of course it also provided employers with an easy route to avoid recognition, particularly since there was no requirement that the recognised union be representative or even independent. But the Article 11 argument in the case could go no further than *Wilson*, which recognised a right of trade unions to be heard but left to 'each state a free choice of the means to be used to secure that right to be heard'.[76] The ECtHR had also explicitly rejected the recognition of any obligation on an employer to recognise a trade union.

A factually-similar scenario arose in the *Boots* case, decided after *Demir* itself and a couple of other important cases in the ECtHR.[77] But the outcome was the same. As is well-known, the Court in *Demir*—expressly departing from its older case-law—found that 'the right to bargain collectively with the employer' was an essential element of the protection afforded by Article 11.[78] The status of 'essential elements', as outlined by the Court, was somewhat unclear:

> … firstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance.[79]

Later in the same paragraph, the Court said that the signatory state must 'take account of the elements regarded as essential' in its case-law.[80] Taken together, these comments suggested that 'essential elements' were not (as one might expect) binding on the state, but did need to be protected. Later cases have clarified that the state's margin of appreciation is reduced where an 'essential element' is at issue, though the Court will always consider all the facts and circumstances when determining whether a violation has occurred.[81] In *Boots*, the Court of Appeal was prepared to take quite a positive view of the impact of *Demir*, even recognising that there could be positive obligations on the state to secure the protection of the right to bargain.[82] Nevertheless,

[76] Above n.56, [42].
[77] *R (Boots Management Services Ltd) v Central Arbitration Committee* [2017] EWCA Civ 66, [2017] IRLR 355.
[78] Above n.53.
[79] Ibid [144].
[80] Ibid.
[81] *Humpert*, above n.66.
[82] Above n.77, [47].

the Court of Appeal applied a wide margin of appreciation when considering whether the restriction imposed by para. 35 of Schedule A1 could be justified.[83] It was decided that the restriction was acceptable because there was a mechanism by which a worker could apply for the (unwanted) union to be derecognised, a procedure that would pave the way for a recognition application from the claimant union. The fact that this procedure was cumbersome was not found to be sufficient to give rise to a breach of Article 11.

The wide margin of appreciation also played a decisive role in *R (IWGB) v CAC* in 2021.[84] This case concerned an attempt by IWGB to be recognised in respect of its members in a situation in which the employer already recognised another independent union, Unison, for the purposes of collective bargaining. An Article 11 challenge to the CAC's inevitable rejection of IWGB's Schedule A1 application was unsuccessful. In an interesting discussion, Bean LJ noted that there were different policy choices that might be made in this situation.[85] On the one hand, unions could be allowed to compete with each other for membership and for recognition. On the other hand, the law might place restrictions on competition in order to promote stable bargaining arrangements and to avoid fragmentation. The choice between these two approaches was clearly a matter for Parliament.

The most recent case to consider a challenge to Schedule A1 is, of course, *Deliveroo*.[86] Here, the challenge was not to the detailed rules about prior recognition of another trade union, but to the personal scope of the recognition procedure itself. The CAC had rejected the union's Schedule A1 application on the basis that the Deliveroo riders were not workers but self-employed in domestic law, due to what it found to be a rarely-exercised but nonetheless genuine power to send a substitute.[87] The union attempted to argue that this was incompatible with Article 11 because it had a broader scope of application. This case requires detailed consideration because it is one of the few Article 11 cases to engage in any depth with the wider s. 2 case-law and, in particular, the decision in *Elan-Cane*.[88]

[83] Ibid [68].
[84] *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2021] EWCA Civ 260, [2021] ICR 729.
[85] Ibid [66]–[67].
[86] Above n.3.
[87] *Independent Workers' Union of Great Britain v RooFoods Ltd* [2018] IRLR 84.
[88] Above n.5.

The Supreme Court correctly based its decision on the Grand Chamber's ruling in *Pastorul Cel Bun*, discussed above,[89] and used the ILO Employment Relationship Recommendation to determine whether the Deliveroo riders were workers for Article 11 purposes.[90] The Recommendation has two key features: it adopts a 'primacy of facts' approach, in which the focus should be on the reality of the parties' relationship rather than on contract documents, and it applies a 'multi-factor' test, in which all the facts and circumstances should be considered and no one factor allowed to dominate. On this basis, it might have been expected that 'Deliveroo' would result in another 'keeping pace' decision, like *Foster Carers*, in which the claimants were found to be workers for Article 11 purposes under this broader test.[91] However, although the Supreme Court gave an accurate account of the Recommendation, it held that the riders did not count as workers because of a single factor: the substitution clause. This has been the subject of considerable criticism.[92]

The most straightforward view of this aspect of *Deliveroo* is that the Supreme Court was complying with the 'not going beyond' rule, not finding a violation where it believed that the ECtHR would be unlikely to do so, even though its assessment of the ECtHR's previous case-law and potential approach is regarded by most commentators as erroneous. But it is hard to avoid the suspicion that the Court's approach was influenced by its view, articulated in the second part of the judgment, that Article 11 did not oblige the government to put a regime like Schedule A1 in place. Even if the riders had been found to be workers, the Supreme Court would have ruled that the decision to exclude them was a matter for the government within the margin of appreciation.[93] It is not surprising, therefore, that the judges were tempted to avoid this stark conclusion by finding that they were not Article 11 workers in the first place.

[89] Above n.62. Some commentators have argued that the Supreme Court should have based its decision on *Manole v Romania* (Application No 46551/06, 16 June 2015), but the Supreme Court's approach reflects the s. 2 HRA requirement to follow either Grand Chamber decisions or lines of case-law. For discussion, see N Countouris, 'Not Delivering: the UK 'Worker' Concept Before the UK Supreme Court in Deliveroo - *IWGB v CAC and another* [2023] UKSC 43' (2024) 15 *European Labour Law Journal* 786; K. Ewing, 'Judicial Backpedaling on Trade Union Rights in the Gig Economy: Deliveroo in the United Kingdom Supreme Court' Institute of Employment Rights blog, 13 December 2023.

[90] Above n.63.

[91] Above n.61.

[92] See G. Pitt, ''The Simple Things You See Are All Complicated': Thoughts on Deliveroo' (2024) 53 *ILJ* 784, and references at n.89 above.

[93] Above n.3, [139].

This leads us neatly to the second part of the judgment, on Schedule A1.[94] As the Supreme Court put it, the question was whether Article 11 required the UK 'to enact legislation conferring on article 11 workers the right to require their reluctant employer to recognise and negotiate with the union of their choice'.[95] This was shortened, in my view inaccurately, to whether Article 11 gave rise to a right to 'compulsory collective bargaining'.[96] The Supreme Court noted that there had been a significant evolution in the ECtHR case-law from an initial approach emphasising the margin of appreciation for signatory states to determine how to enable trade unions to 'strive' for the protection of their members' interests, to *Demir*, in which a right to collective bargaining had been recognised as one of the 'essential elements' of Article 11.[97] The crucial issue was therefore what the right to collective bargaining as recognised in *Demir* entailed in practice, particularly in terms of positive obligations on the state to promote or facilitate collective bargaining. One route to determining this question would have been to focus on what other international instruments have said about the right, given that the ECtHR often refers to such instruments. Article 4 of ILO Convention 98, for example, requires the state to take positive steps to facilitate collective bargaining.[98] However, crucially, in this part of the judgment, the Supreme Court took what might be seen as a more traditional 'common law' approach to finding the 'ratio' of the decision in *Demir*.[99] Since the state had annulled a collective agreement in *Demir*, the right to collective bargaining recognised in that case was taken to be a right not to have a collective agreement annulled by the state. The Supreme Court stated that 'in *Demir*… the Strasbourg Court was *not prepared* to hold that article 11 rights include the right to compulsory collective bargaining' (my emphasis).[100] However, it would be more accurate to say that the issue did not arise for decision.

The Supreme Court went on to consider the ECtHR's admissibility decision in *Unite*,[101] in which a challenge to the UK's decision to abolish the Agricultural Wages Board (AWB) had been rejected.[102] *Unite* is not an easy case to interpret: as an admissibility decision, it is not fully reasoned, and it proceeded on the basis that the AWB was a form of compulsory collective bargaining, when it

94 Ibid [74]–[139].
95 Ibid [76].
96 Counsel for the union objected to the terminology but the Supreme Court rejected the objection: ibid [77]–[84].
97 Above n.53.
98 ILO, Right to Organise and Collective Bargaining Convention, 1949 (Convention No. 98).
99 Above n.3, [103].
100 Ibid.
101 *Unite the Union v United Kingdom* [2017] IRLR 438, (2016) 63 EHRR SE7.
102 Above n.3, [104]–[111].

was better regarded as a mechanism set up by the state to determine wages in the absence of effective collective bargaining in the sector. The ECtHR found that the abolition of the AWB did not give rise to an admissible Article 11 claim, principally because the union could still represent its members, albeit not very effectively because of the practical difficulties associated with organising agricultural workers. The Supreme Court's view of the case was that it did not advance the jurisprudence beyond *Demir* or hold that Article 11 required the state to provide for 'compulsory collective bargaining', and instead allowed the state a wide margin of appreciation in relation to collective labour rights.[103]

The Supreme Court's interpretation of the Strasbourg case-law has been criticised for taking an unduly narrow view of what the Court decided in both *Demir* and *Unite*.[104] There is much force in these criticisms. However, for present purposes, the key point is that the 'mirror' principle meant that this interpretation determined the outcome. Following *Elan-Cane*, it was held that where the ECtHR had decided that the state enjoyed a margin of appreciation on a particular point, it was not for the domestic court to find a violation or to decide what the state should do within the margin of appreciation.[105] There is no option for the domestic court to decide that, even though Strasbourg has not found or might not have found a violation, it can reason from first principles and offer better protection to Convention rights. In relation to the Schedule A1 recognition procedure specifically, the effect of 'Deliveroo' is that most attempts to challenge aspects of Schedule A1 under Article 11 are doomed to failure: because Article 11 does not oblige the UK to have any such procedure, its design will not normally breach Article 11 either.

One caveat is in order. The duty not to discriminate in Article 14 ECtHR places obligations on signatory states when their actions are within what is sometimes termed the 'scope' or 'ambit' of a particular Convention right, even if they are not directly in breach of that right. For example, in putting in place a recognition procedure, the UK is acting 'within the scope' of Article 11 even though it is not obliged to create such a procedure. This means that excluding particular groups of workers in an arbitrary or discriminatory way might still be a breach, even though the state has a substantial margin of appreciation.[106] This provides one way of explaining and justifying the decisions in the *Foster Carers*[107] and *Vining* cases.[108] Both of these cases

[103] Ibid [77]–[84].
[104] E.g. Ewing, above n.89.
[105] Above n.3, [130].
[106] See A. Bogg et al, *Human Rights at Work* (Hart 2024), 38, for discussion.
[107] Above n.61.
[108] *Wandsworth LBC v Vining* [2017] EWCA Civ 1092, [2018] ICR 499.

concerned specific occupational groups – foster carers and parks police officers – who were not given access to collective rights: the ability to get their trade union listed and consultation on collective redundancies respectively. In the foster carers' case, this was because they had not been classified as workers, and in *Vining*, it was because they were caught by a more general exclusion for police officers from collective labour rights. In relation to foster carers, the court did not think that the reasons given for excluding them – that caring for children should not be treated as an ordinary job, for example – were persuasive.[109] In relation to the parks police, there was a clear sense that while the 'regular' police could be treated differently because of their particular role in society as an emergency service, the same considerations did not apply to the parks police.[110] In both cases, it was a breach of Article 11 to exclude them from protection even though, strictly speaking, not all of the protection on offer might be required by Article 11 itself. This is particularly obvious in *Vining*, where collective redundancy consultation was the right at stake. Of course, both of these cases were decided prior to 'Deliveroo', and the Supreme Court in that case cast doubt on some of the bolder statements in the domestic courts in previous cases about the meaning of Article 11.[111] However, in my view, the 'equal treatment' exception should still be regarded as good law. 'Deliveroo' itself concerned the definition of the employment relationship rather than the arbitrary exclusion of an occupational group, and an attempt to reframe the case in the latter terms and to argue it as such was given short shrift by the Supreme Court.[112]

Another area in which the margin of appreciation has played an important role is in relation to the right to strike. The very earliest cases in which attempts were made to challenge restrictions on the right to strike in the UK were unsuccessful because the ECtHR had not, at that point, given clear recognition to the right to strike. In *London Underground Ltd v RMT*, for example, the Court of Appeal simply noted that the right to strike was one means among many by which a trade union might strive to protect its members' interests.[113] It was therefore open to the state to place restrictions on that right. By the time of *Metrobus*,[114] the ECtHR's case-law had moved

[109] Above n.61, [127]–[134].
[110] Above n.108, [64]–[66].
[111] Above n.3, [134].
[112] Ibid [135]–[138].
[113] *London Underground Ltd v National Union of Rail Maritime and Transport Workers* [2001] EWCA Civ 211, [2001] ICR 647, [61].
[114] Above n.65.

on: the Court had recognised the right to strike in *Enerji*.[115] However, as I explained above, the decision in *Enerji* was insufficient to fulfil the 'clear and constant' jurisprudence requirement: it is a decision of a Chamber and is much less clearly reasoned than *Demir*, for example. But the margin of appreciation was important too. The leading judgment in *Metrobus* is somewhat ambiguous as to its approach to the restrictions under consideration: there are early references to a wide margin of appreciation, but when the discussion turns to the restrictions themselves, margin of appreciation is not mentioned again. However, the restrictions were found to be 'not disproportionate' after a relatively light-touch review, suggesting that the state was well within the margin.[116] Indeed, it was noted that the wording of the provisions had changed a few times under different governments, adding to the perception that the state was making adjustments *within* the margin. Although the position has been altered somewhat by Elias LJ's comments on interpretation in the *Serco* case, discussed in the next section, *Metrobus* remains binding at Court of Appeal level and below and has effectively stifled any further development of domestic case-law challenging restrictions on the balloting and notice provisions.[117] And, as noted in the previous section, although the Strasbourg case-law has continued to develop, the Court's position on the right to strike is still not strong enough to require the domestic courts to reconsider.[118]

The margin of appreciation has also proved determinative in cases involving restrictions on strikes in essential services. These have been challenged in a number of cases involving prison officers. The Divisional Court's ruling in *Secretary of State v Prison Officers' Association* confirms the important role being played by the margin of appreciation in this context.[119] The Secretary of State initiated contempt proceedings against the union for inducing its members to strike in breach of an injunction designed to reinforce the statutory prohibition on strikes by prison officers in section 127 TULRCA 1992. The court rejected the idea that Convention arguments could be used as a defence to contempt proceedings, noting that the correct route was to apply for the injunction to be discharged. But there were some interesting obiter comments on the ban itself. Central to the union's argument was the claim

[115] Above n.66.

[116] Above n.65, [113].

[117] *National Union of Rail, Maritime and Transport Workers v Serco Ltd* [2011] EWCA Civ 226, [2011] ICR 848.

[118] See discussion and references at n.69, above.

[119] *Secretary of State for Justice v Prison Officers Association* [2019] EWHC 3553 (QB), [2020] ICR 1257, [85]–[95].

that, if the state put in place a ban on industrial action in an essential service, alternative measures should be put in place to enable the union to protect its members' interests. The judge found that the ECtHR case-law did not give clear guidance on what was required. This meant that a significant margin of appreciation was in play:

> This court is simply not equipped to decide whether one sort of compensating measure is better than another or to assess its adequacy in the absence of some hard-edged or bright line requirement that the Secretary of State is required to have complied with but has not.[120]

The court was not competent to make choices within that margin. In *Humpert*, a much more recent case, the ECtHR itself assessed the totality of measures put in place by Germany to compensate for a public sector strike ban, but it is unclear whether the domestic courts would be willing to engage in any greater scrutiny as a result of this decision, an issue I return to in section 4, below.[121]

The rule that domestic courts should not 'go beyond' the Strasbourg case-law when deciding cases under the HRA has had a significant impact on Article 11 cases. The first part of the rule, that a domestic court should not find a violation where Strasbourg has not done so, precludes any domestic attempt to tackle head-on the UK's ban on secondary action. The second part of the rule, that it is not for the courts to decide within the margin of appreciation, has precluded any effective Article 11 challenge to the details of the Schedule A1 recognition procedure and to the industrial action legislation. In relation to Schedule A1, the UK courts began by applying a wide margin of appreciation, which crystallised over time into the position that Schedule A1 is not normally reviewable under Article 11 because the decision to have a recognition procedure is itself an exercise of the state's discretion within the margin of appreciation. In relation to industrial action, the courts initially began with the latter approach: Article 11 did not oblige states to give effect to the right to strike, so it could not govern any restrictions on that right. Over time, as it has become clear that the ECtHR does recognise the right to strike, the courts have moved towards reasoning more closely focused on the idea that the state has a wide margin of appreciation in determining the conditions for a lawful strike, and that it is not for the courts to judge the choices they make within that margin.

[120] Ibid [85].
[121] *Humpert*, above n.66.

C. Incremental Development Only

There are relatively few examples of the third element of section 2 HRA, which allows the domestic courts to develop rights but only incrementally and in ways that the ECtHR itself would be likely to engage in if faced with the same case. No doubt part of the explanation for this is the 'blockage' caused by the margin of appreciation, as discussed in the previous section. I consider three examples here: *Serco*, *Vining* and *Mercer*.

Serco is well-known for Elias LJ's comments about the correct way to interpret the legislation on industrial action.[122] Because he was bound by the Court of Appeal's earlier decision in *Metrobus*, there was very little he could do to develop Article 11 in the context of industrial action.[123] However, his comments are still significant and amount, in my view, to a subtle incremental development prompted, in part at least, by Article 11.[124] He rejected a view that had prevailed in earlier years that the statutory immunities were a 'privilege' granted to trade unions and should be construed strictly against them.[125] Instead, he gave clear guidance that a neutral construction should be adopted in the light of Article 11.[126] Although he did not offer a detailed analysis of ECtHR case-law, there are some echoes of the ECtHR's ruling in *Wilson*, in which the House of Lords had adopted a literal construction of the relevant legislation rather than one which gave effect to the Article 11 rights at stake.[127] Elias LJ's comments have had a positive impact on the way in which applications for injunctions are considered in the High Court.[128] It does not therefore seem far-fetched to suggest that *Serco* is an example of incremental development.

One of the boldest domestic decisions on Article 11 is, of course, *Vining*.[129] As I explained earlier, one way of understanding that decision is as a relatively orthodox ruling on 'discriminatory' or otherwise unjustified exclusions from access to Article 11 rights. However, the court made quite a strong move when it decided that Article 11 was engaged in the case. The claimants had been excluded from the statutory right to be consulted in the event of collective

[122] Above n.117.
[123] Above n.65.
[124] He also cited Lord Bingham's comment in *P v National Association of School Masters/Union of Women Teachers* [2003] UKHL 8, [2003] 2 AC 66, [7], that the legislation should be given a 'likely and workable construction'.
[125] E.g. *Express Newspapers v McShane* [1979] ICR 2010 (CA) 219, per Lord Denning MR.
[126] Above n.117, [9].
[127] Above n.56.
[128] E.g. *Warrington Borough Council v Unite the Union* [2023] EWHC 3093 (KB), [2024] ICR 599.
[129] Above n.108.

redundancies. It was argued on behalf of the Secretary of State that this did not form part of the concept of 'collective bargaining' recognised in *Demir*, because the right was to be consulted and because it did not deal with terms and conditions of employment such as pay or hours. However, the Court of Appeal rejected these arguments, holding that the definition of consultation in the statute was 'with a view to reaching agreement', so that it was analogous to collective bargaining, and that redundancies were a prime example of the kind of issue unions might want to bargain about.[130]

It is worth noting that *Vining* was decided after some of the bolder decisions on advancing the interpretation of Convention rights, such as *Nicklinson*,[131] and before the return to a stricter approach to incremental development in *Elan-Cane*.[132] Perhaps it is just an outlier from another time, when the courts were more prepared to develop their own views. But I think it is appropriate to see this element of *Vining* as an example of what an incremental development might look like. It is not implausible to suggest that the ECtHR would have seen the ability to make representations when faced with collective redundancies as a matter engaging Article 11, for the reasons the Court of Appeal itself gave. The Strasbourg court itself would probably have looked beyond the form of the legislation and would have focused on its function instead.

The final example of incremental development is the recent decision of the Supreme Court in *Mercer*.[133] In that case, the claimant argued that the absence of any protection in s. 146 TULRCA against detrimental treatment on grounds of trade union membership or activities for workers taking part in lawful strike action was a breach of Article 11.[134] Lady Simler's judgment, rather like that in 'Deliveroo', offers a wide-ranging survey of the ECtHR's Article 11 jurisprudence. She began by grappling with the concepts of 'essential', 'core' and 'accessory' in *RMT*, without the benefit of the ECtHR's further discussion of these distinctions in *Humpert*, which was decided after *Mercer* had been heard but before the judgment had been handed down.[135] Lady Simler took the view that 'essential' and 'core' were used interchangeably in *RMT*, and that the right to strike was neither.[136] This meant that the

[130] Ibid [63].
[131] Above n.30.
[132] Above n.5.
[133] Above n.10.
[134] The Supreme Court first considered whether it was correct to read s. 146 as not applying to industrial action, and held that it was: ibid [44]–[60].
[135] *Humpert*, above n.66.
[136] Ibid [69] and [72].

state enjoyed a wide margin of appreciation when regulating the right to strike. There are two errors here. First, as Katsaroumpas has noted, while the ECtHR has not decided that the right to strike is an 'essential' element of Article 11, Lady Simler incorrectly advanced the stronger proposition that the ECtHR had decided that it was *not* an 'essential' element.[137] Second, as Bogg has argued and as has since been confirmed in *Humpert*, 'essential' and 'core' are different concepts.[138] There are 'core' and 'accessory' elements within the right to strike, even though the right to strike itself has not yet attained 'essential' status. This is important because it is arguable that the margin of appreciation should have been narrower to reflect the fact that the strike action in *Mercer* was a primary strike (against the claimant's employer) and that the claimant was therefore exercising a 'core' element of the right to strike.

The Supreme Court went on to reinforce the wide margin of appreciation to be applied in *Mercer* by deriving a distinction from the Strasbourg jurisprudence between the treatment of public and private sector employees.[139] It was argued that the ECtHR allowed the state a wider margin of appreciation where it was acting as regulator rather than employer. Again, this is open to question, as Sanders has argued, since the proposition does not necessarily follow from the various cases cited in support.[140] A better view of the Strasbourg authorities is that they take a dim view of any sanctions targeted at individuals, whether they are private or public sector employees, as cases such as *Danilenkov* and *Wilson* make clear.[141] Another factor not considered in *Mercer* but drawn out very clearly by the ECtHR in *Humpert* is the need to consider the state's protection of Article 11 rights in the round before drawing any conclusions.[142] In *Humpert* itself, this led to the conclusion that the right to strike could be restricted for teachers who were civil servants because of the wide range of other protections and privileges they enjoyed as a result of that status. However, the opposite must

[137] I Katsaroumpas, '*Secretary of State for Business and Trade v Mercer*: An Unqualified Victory for the Right to Strike?', UK Labour Law Blog, 7 June 2024.

[138] A. Bogg, 'Bringing the Right to Strike Home: *Secretary of State for Business and Trade v Mercer* – Part 1 and Part 2', Oxford Human Rights Hub Blog, 10 May 2024, and see *Humpert*, above n.66.

[139] Above n.10, [80].

[140] A. Sanders, 'Extending Statutory Protection to Action Short of Dismissal for Participating in Industrial Action: the Supreme Court on the Right to Strike in *Secretary of State for Business and Trade v Mercer*' (2024) 53 *ILJ* 762.

[141] *Danilenkov v Russia* (2014) 58 EHRR 19; *Wilson*, above n.56.

[142] *Humpert*, above n.66.

also follow: as a private sector employee with no effective means other than industrial action to advance her interests, it was more important for the state to give strong protection to Ms Mercer's Article 11 rights.

As with 'Deliveroo', Lady Simler's attempt to survey the ECtHR case-law was not strictly necessary for the decision and may have stored up problems for the future.[143] However, *Mercer* still qualifies, in my view, as an example of incremental development because of the outcome. The Supreme Court held, using robust language, that the claimant's Article 11 rights had been infringed:

> Moreover, in my judgment the right of an employer to impose any sanction at all short of dismissal for participation in lawful industrial action nullifies the right to take lawful strike action. If employees can only take strike action by exposing themselves to detrimental treatment, the right dissolves.[144]

Even a wide margin of appreciation may sometimes be exceeded, and in this case, the total absence of any protection was fatal to the government's case. The Supreme Court went on to issue a declaration of incompatibility.[145] As Katsaroumpas points out, a simpler solution would have been to find a breach based on the government's complete failure to advance a legitimate aim for the legislation,[146] probably because no serious thought had ever been given to the issue by policy-makers.[147]

Although there is much to criticise in the *Mercer* decision, it is a good example of the process of incremental development in action. The ECtHR has never spelled out in precise terms what the state's positive obligations to protect striking workers entail. The Court would need to develop its thinking in order to decide a similar case. But it seems unlikely that the Court would hold that the state's positive obligation could legitimately be fulfilled by providing no protection at all. On this view, it seems entirely appropriate for the Supreme Court to predict that Ms Mercer would have won in Strasbourg and to decide the domestic case accordingly.

The three cases discussed in this section – *Serco*, *Vining* and *Mercer* – are a diverse group decided at different times in the evolution of the HRA, so it is perhaps best not to draw too strong a conclusion from them. However, they

143 Katsaroumpas, above n.137.
144 Above n.10, [89].
145 Bogg and Ford note that a difficulty with this is the suggestion that some types of detriment may be acceptable, a point which has been reflected in the Employment Rights Bill: A. Bogg and M. Ford, 'From "Fairness at Work" to "Making Work Pay": A Preliminary Assessment of the Employment Rights Bill', UK Labour Law Blog, 14 October 2024.
146 A point acknowledged in the judgment: above n.10, [89].
147 Katsaroumpas, above n.137. The point has echoes of *Vining*, above n.108.

do illustrate that it is sometimes possible to persuade the courts to make incremental steps forward in their interpretation of the Article 11 case-law, particularly where the alternative is not seriously sustainable (hostile interpretation of strike legislation, exclusion of redundancy from the list of matters on which trade unions might want to represent their members' interests, and the complete absence of any protection against employer penalties short of dismissal for striking workers). This provides an important (if rather discouraging) key to understanding the kinds of case that are likely to succeed.

4. STRATEGIC LITIGATION

Although my focus has been on achieving a better understanding of the case-law, there are, of course, significant implications for future test cases on Article 11. I offer a brief overview of some of these here, whilst noting that any discussion of this kind is inevitably somewhat speculative, particularly in the absence of concrete facts.

A better understanding of the role of section 2 HRA enables us to see more clearly which kinds of case are probably not worth pursuing at all. These were highlighted in the discussion above. For example, the rule that the domestic courts should not 'go beyond' the ECtHR precludes a direct challenge to the ban on secondary strike action after *RMT*.[148] Similarly, the view, recently re-affirmed in *Elan-Cane*, that it is not for the domestic courts to take decisions where the state is given a margin of appreciation by the ECtHR, suggests that there is little point in bringing further challenges to the detailed rules of the Schedule A1 recognition procedure.[149]

There are some cases with better prospects, theoretically at least. Another gap in section 146 TULRCA is where the employer's detrimental treatment of the worker is aimed at getting them to give up collective bargaining.[150] There is a right not to be offered an inducement to give up collective bargaining under section 145B TULRCA, following the ECtHR's decision in *Wilson v UK*,[151] but section 145B(4) excludes 'having terms of employment determined by collective agreement' from the definition of 'making use of a trade union service' in section 146. Although this exclusion seems to have been deliberate, it is difficult to see how it could be justified, particularly

[148] Above n.8.
[149] Above n.5.
[150] This gap in protection was identified by AL Bogg, 'Employment Relations Act 2004: Another False Dawn for Collectivism?' (2005) 34 *ILJ* 72.
[151] Above n.56.

when the legislation bans inducements, which (unlike detriments) do not harm the individual. Moreover, although a wide margin of appreciation applies, the ECtHR held in *Demir* that collective bargaining was an 'essential element' of Article 11.[152] By analogy with *Mercer*, it could be argued that allowing an employer to engage in detrimental treatment of a worker who wants to retain collective bargaining is a denial of the right and is outside even a wide margin of appreciation.[153]

As the *Vining* and *Foster Carers* cases have shown, arbitrary exclusions of particular groups of workers from at least the 'essential elements' of Article 11 are open to challenge.[154] For example, it was held in *Pastorul cel Bun* itself that clergy fell within the scope of Article 11, despite the religious nature of their duties.[155] Although the Court ultimately upheld the state's decision not to register a clergy trade union because it pursued the legitimate aim of protecting the autonomy of religious groups, there is a strong argument that a court in the UK would need at least to recognise clergy as workers for Article 11 purposes in order to 'keep pace' with the Strasbourg case-law.[156] And despite the ruling in *RMT*, it might be possible to bring a more limited challenge to the rules on secondary action, for example, where a firm had deliberately divided itself up into separate legal entities in order to reduce the power of a trade union.[157] It could be argued that strike action in these circumstances is properly to be regarded as primary, not secondary, and that the state, therefore, enjoys a reduced margin of appreciation. This might allow a court to predict that the ECtHR would not uphold the restriction, and thus to find a violation of Article 11 as an incremental development.[158]

The Employment Rights Bill, before Parliament at the time of writing, will repeal some of the restrictions on industrial action that might otherwise have been open to an Article 11 challenge. One is the 12-week time limit on the protection against dismissal afforded to employees taking part in a lawful strike.[159] Applying the reasoning in *Mercer*, it could have been argued that this was another situation in which the prospect of employer sanctions

[152] Above n.53.
[153] Above n.10.
[154] Above nn.108 and 61 respectively.
[155] Above n.62.
[156] The leading authority is *Sharpe v Worcester Diocesan Board of Finance Ltd* [2015] EWCA Civ 399, [2015] ICR 1241, but the recent ET decision in *Green v Lichfield Diocesan Board of Finance* (2409635/2022, July 2023) took a broader view in the light of *Gilham v Ministry of Justice* [2019] UKSC 44, [2019] ICR 1655.
[157] Above n.8.
[158] See Bogg and Ewing, above n.9, 249–250.
[159] TULRCA s. 238A. See Employment Rights Bill, s. 64.

'negated' the right of an individual to participate in a lawful strike.[160] Of course, the 12-week time limit is less clear-cut than the situation in *Mercer*, because employees have strong protection against dismissal until that limit is reached. However, dismissal is the employer's most severe sanction, and there is no obvious justification for the particular time period chosen. Another restriction to be repealed is the legislation on minimum service levels.[161] While this may not seem like a promising avenue for litigation after *Humpert*, in which the Court upheld a ban on strike action for teachers in Germany with civil service status, an important feature of the decision was the Court's wide-ranging analysis of all the arrangements the state had put in place to protect their interests.[162] While the Court's analysis is open to criticism, the important point for present purposes is that the converse must also follow (as I noted above in relation to *Mercer*): if a worker or group of workers has no alternative means of protection, it is much more important to uphold their right to strike.[163] For example, in the UK Border Force, pay is set by collective bargaining, but the proposed minimum service level would have made meaningful strike action impossible in practice.[164] A domestic court could reasonably have predicted that the ECtHR would not uphold the restriction under these circumstances.

Understanding more about section 2 is helpful not only for considering which cases to bring but also for deciding how they should be presented. A detailed analysis of the ECtHR's case-law is clearly essential, but this is not enough on its own. First, there is no point in expecting a domestic court to treat Article 11 as an opportunity to reason from first principles about collective labour rights. Instead, close attention must be paid to the *ratio* of decisions in the ECtHR and their relationship to the case at hand. This is a particularly difficult challenge because it limits the value and relevance of Strasbourg cases dealing with other signatory states (and therefore with different legislation and context) and goes against the grain of treating human rights as broader 'benchmarks' against which to evaluate the law. Second, what the domestic court is being asked to do might usefully be more explicitly framed using the 'mirror' principle. For example, is the court being

[160] Above n.10.

[161] Strikes (Minimum Service Levels) Act 2023, and see Employment Rights Bill, s. 65.

[162] Above n.66.

[163] Above n.10.

[164] See Home Office, *Border Security: Minimum Service Levels during Strike Action* (November 2023). The trade union PCS had begun a judicial review challenge: Institute of Employment Rights, Union given High Court permission to challenge Government's new strike restrictions, 10 May 2024.

asked to 'keep pace' or to engage in incremental development? If there is no clear authority to follow, how might a development be characterised as incremental?

Of course, even with close attention to these principles, litigants may not always get the outcomes they were hoping for. As 'Deliveroo' and *Mercer* have both demonstrated, wildly differing interpretations of the Strasbourg case-law are possible, even when the Supreme Court grapples with the matter at length. The various avenues for future litigation, discussed above, are all high-risk, and it is difficult to predict outcomes with any confidence.

All this generates a further problem for the strategic litigant. If the domestic courts are determined to follow the Strasbourg jurisprudence very closely, the only way to develop the law on Article 11 and to encourage greater human rights protection is to go to Strasbourg. This requires the exhaustion of domestic remedies, so months or years of pointless litigation in the domestic courts.[165] But the ECtHR has also shown itself reluctant to continue developing the Article 11 jurisprudence. The wave of optimism generated by *Demir* has been dampened down by disappointing decisions in cases such as *RMT* and *Humpert*, suggesting that the Court is willing to tackle egregious violations but is not particularly interested in 'tweaks' to the legislation of broadly compliant states such as the UK and Germany. It may be necessary to shift the focus toward the European Committee on Social Rights and the ILO[166] to put pressure on the ECtHR to continue developing its case-law in progressive directions.[167]

5. CONCLUSION

I have sought to demonstrate in this paper that the major domestic decisions on the interpretation of Article 11 in trade union cases can be explained relatively straightforwardly as orthodox applications of the 'mirror' principle based on the section 2 duty to 'take into account' the Strasbourg case-law, even though the cases laying down the 'mirror' principle are rarely discussed in judgments on Article 11. What may appear, at first sight, as a lack of judicial interest in principled and creative interpretation of Article 11 is, in fact,

[165] Article 35(1) ECHR.

[166] Though a notable difficulty here is the ongoing dispute regarding the right to strike: see ILO, 'ILO Refers Dispute on the Right to Strike to the International Court of Justice', 11 November 2023.

[167] Bogg and Ewing, above n.9, 249–250.

a reflection of a more general cautious and precedent-driven approach to the interpretation of Convention rights, in which the domestic approach is closely pegged to the Strasbourg case-law. It is important to be clear that my explanation of the case-law with reference to section 2 does not amount to a defence of the courts' approach. There is much to criticise here. The 'mirror' principle is, itself, open to question because it limits the potential for a constructive dialogue between the domestic courts and the ECtHR, a dialogue which the ECtHR would probably welcome.[168] And even taking into account the constraints of the 'mirror' principle, the courts' interpretations of Strasbourg decisions can sometimes be debateable or even wrong. Understanding what the courts are trying to do is important both for scholars seeking to critique the law and for litigants planning future challenges, though the prospects here are not very encouraging.

To avoid ending on a gloomy note, it is worth bearing in mind that one of the factors thought by some commentators to explain both the domestic approach to section 2 and the ECtHR's moderation after *Demir* was the febrile political atmosphere surrounding the HRA and the Convention under the last Conservative government.[169] Proposals emerged at various points to replace the HRA with a British Bill of Rights and even to withdraw from the ECHR itself. Since then, the UK has, of course, seen a seismic change in the political landscape. It remains to be seen whether this will reduce the anxieties of the domestic courts or the ECtHR and bring about any alteration in approach at either level.

[168] See eg Letwin, above n.34.

[169] E.g. A. Ramshaw, 'A Crack in the Mirror: Reclaiming the Human Rights Narrative from Strasbourg in Agenda Setting Theory and Legal Narrative' [2022] *EHRLR* 144.