Appeal No. UKEAT/0285/17/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28, 29 March and
1 April 2019
Judgment handed down on 23 July 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

MRS M V McARTHUR

MS P TATLOW

NATIONAL UNION OF PROFESSIONAL FOSTER CARERS (NUPFC) APPELLANT

CERTIFICATION OFFICER RESPONDENT

(1) IWGB
(2) SECRETARY OF STATE FOR EDUCATION
(3) LOCAL GOVERNMENT ASSOCIATION
(4) EUROPEAN CHILDREN'S RIGHTS UNIT INTERVENORS

JUDGMENT

APPEARANCES

For the Appellant	Ms Rachel Crasnow (One of Her Majesty's Counsel) Mr David Stephenson & Ms Rachel Barrett (of Counsel) Instructed by: TMP Solicitors 40 Bank Street (30th Floor) Canary Wharf London E14 5NR
For the Respondent	Mr Thomas Linden (One of Her Majesty's Counsel) Ms Jane Russell (of Counsel) Instructed by: Government Legal Department Employment Group One Kemble Street London WC2B 4TS
For the First Intervenor	Mr John Hendy (One of Her Majesty's Counsel) Ms Katharine Newton & Ms Madeline Stanley (of Counsel) Instructed by: Harrison Grant 45 Beech Street London EC2Y 8AD
For the Second Intervenor	Mr Ben Collins (One of Her Majesty's Counsel) Mr Robert Moretto (of Counsel) Instructed by: Government Legal Department Employment Group One Kemble Street London WC2B 4TS

For the Third Intervenor	Mr Peter Oldham (One of Her Majesty's Counsel) Written Submissions Only
For the Fourth Intervenor	Mr Jamie Burton (of Counsel) Written Submissions Only

SUMMARY

TRADE UNIONS

WORKER STATUS

ARTICLE 11 ECHR

The Appellant is a trade union set up to represent the interests of foster carers. It applied to the Certification Officer (who is the Respondent to the Appeal) to be entered on to the list of Trade Unions maintained by the Respondent pursuant to s.2 of the **Trade Union Labour Relations (Consolidation) Act 1992** ("**TULRCA**"). The Respondent rejected the application on the grounds that it was not an organisation consisting "wholly or mainly of workers" within the meaning of s.1 of **TULRCA**; a "worker", for these purposes, being an individual who works under a contract: s.296 of **TULRCA**. In particular, the Respondent found that, on the information before him, the relationship between foster carers and local authorities was regulated by a Foster Care Agreement that was not contractual in nature, and he considered himself bound by existing case law to that effect. The Appellant appealed against the Respondent's decision and in doing so raised a number of Human Rights arguments not raised below.

Held (dismissing the Appeal): that the Respondent was correct to conclude that the foster carers did not work under a contract. There was binding authority to that effect, which also bound the EAT. The EAT concluded that that line of authority, commencing with **Norweb Plc v Dixon** [1995] 1 WLR 636 and **W v Essex County Council** [1993] 3 WLR 534 CA, was correct in any event. There was, in the present case, a statutory code governing the relationship which imposed an obligation on the parties to enter into a form of agreement the terms of which were laid down by statute and regulations. In that scenario, there was no freely entered into contract.

The refusal to list meant that, amongst other things, the Appellant could not seek compulsory recognition for the purposes of collective Schedule A1 to **TULRCA**. However, the matters raised did not give rise to an interference with the Appellant's Art 11 rights to form or join a union or

to engage in collective bargaining. The Appellant could engage in voluntary collective bargaining.

Even if that was wrong, any interference was relatively minor in nature, given the Appellant's ability to engage in voluntary collective bargaining in relation to a wide range of matters. This was an area in which the State had a broad margin of appreciation. In drawing a distinction between those who worked under a contract and those who did not for the purposes of accessing trade union listing and the rights that flowed from that, Parliament had achieved a fair balance between the competing interests of workers and management, and there was no violation of Art 11.

Furthermore, there was no breach of Art 14 (the right not to be discriminated against in the exercise of Convention rights) for the simple reason that the absence of a contract did not give rise to any "other status" within the meaning of that Article.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

Introduction

1. The Appellant is a trade union set up to represent the interests of foster carers. On 18 January 2017, the Appellant applied to the Certification Officer, who is the Respondent to this Appeal, to be entered on the list of Trade Unions ("the List") maintained by the Respondent pursuant to s.2 of the **Trade Union Labour Relations (Consolidation) Act 1992** ("**TULRCA**"). In order to be registered, the Respondent had to be satisfied, amongst other things, that an applicant is a trade union. The Respondent, by a decision dated 10 July 2017, rejected the Appellant's application on the grounds that it was not an organisation consisting "*wholly or mainly of workers*" within the meaning of s.1 of **TULRCA**; a "*worker*", for these purposes, being an individual who works under a contract: s.296 of **TULRCA**. In particular, the Respondent found that, on the information before him[1], the relationship between foster carers and local authorities was regulated by a Foster Care Agreement ("FCA") that was not contractual in nature, and he considered himself bound by existing case law to that effect.

2. The Appellant appeals against that decision. It contends that the Respondent erred in that previous case law to the effect that foster carers do not work under contracts has been wrongly applied to this case. Furthermore, although no human rights arguments were raised before the Respondent, it is contended that if foster carers do not work under contracts, the Respondent's refusal to enter the Appellant on to the List amounted to a breach of Art 11 of the **European Convention on Human Rights** ("**ECHR**") or, alternatively, Art 14 read with Art 11.

3. Various parties have been permitted to intervene in this appeal. These are:

[1] The Certification Officer at that date was Mr Gerard Walker.

a. The Independent Workers Union of Great Britain ("IWGB"), a Trade Union, some of whose members are foster carers;

b. The Secretary of State for Education ("SSE"), who has responsibility for the legislative framework under which foster care is provided;

c. The Local Government Association ("LGA"), which is an association representing the interests of local authorities; and

d. The European Children's Rights Unit ("ECRU"), which is an academic body with expertise in children's rights.

4. The LGA and ECRU were not represented at the hearing but lodged written submissions.

Background

5. The Appellant was formed on 1 January 2017 with a view to providing advice and advocacy to foster carers and to bargain collectively regarding foster carers' pay and conditions. On 18 January 2017, it applied for entry onto the List. The Appellant's name at that stage was the "Foster Carers Workers Union". The Appellant was briefly incorporated as a limited company. However, in order to comply with s.10 of **TULRCA**, which precludes trade unions from having incorporated status, the Appellant confirmed, by way of a letter dated 16 May 2017 from its solicitors, that it would be unincorporated and would be known by its current name, the "National Union of Professional Foster Carers".

6. As at the time of application, the Appellant had six officers and just six members, none of whom were paying members. Its chairman was Mr Findlay. We have not been taken to any rulebook, members' agreement, or other form of constitution governing the Appellant.

7. The Respondent made an initial assessment of the application against the main criteria for a trade union, namely whether it was an organisation consisting "wholly or mainly of workers". The Respondent reviewed the case law and concluded that the key issue was whether foster carers worked under a contract. The Respondent highlighted this issue to the Appellant. Its response was to suggest that the case law to which the Respondent had referred no longer amounted to good law. On 2 May 2017, the Respondent's office wrote to the Appellant's solicitors asking if the FCAs between foster carers and local authorities referred to in some of the previous case law still existed and, if so, whether there had been any significant changes to their status or content since. The Appellant's response, dated 16 May 2017, did not address this key issue. Instead, it was asserted, as before, that the previous decisions did not amount to good law as they had been "trumped" by the Court of Appeal's decision in **Pimlico Plumbers v Smith** [2017] ICR 657. There was no suggestion at any time from the Appellant that there had been any change in the nature of the FCAs from that which had been considered by the previous cases.

8. The Respondent issued his decision in respect of the Appellant's application to be entered on the List on 10 July 2017. His conclusion (set out in admirably concise terms in a five-page decision) was that the relationship between foster carers and local authorities continues to be regulated by the Special Foster Care Workers Agreement, which has already been examined by the Courts. He went on to say that the previous cases, by which he was bound, were direct authority for the relationship between foster carers and the local authority not being contractual. It followed that the Appellant was not an organisation comprising "wholly or mainly of workers" within the meaning of **TULRCA**, and the Appellant's application for listing was rejected.

Main statutory provisions

9. Section 3 of **TULRCA** sets out the requirements for listing a trade union. It provides:

"(1) An organisation of workers, whenever formed, whose name is not entered in the list of trade unions may apply to the Certification Officer to have its name entered in the list.

(2) The application shall be made in such form and manner as the Certification Officer may require and shall be accompanied by—

(a) a copy of the rules of the organisation,

(b) a list of its officers,

(c) the address of its head or main office, and

(d) the name under which it is or is to be known,

and by the prescribed fee.

(3) If the Certification Officer is satisfied—

(a) that the organisation is a trade union,

(b) that subsection (2) has been complied with, and

(c) that entry of the name in the list is not prohibited by subsection (4),

he shall enter the name of the organisation in the list of trade unions."

10. The definition of a "trade union" is at s.1 of **TULRCA:**

"1. In this Act a "trade union" means an organisation (whether temporary or permanent)—

(a) <u>which consists wholly or mainly of workers</u> of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations; or

(b) which consists wholly or mainly of—

(i) constituent or affiliated organisations which fulfil the conditions in paragraph (a) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil those conditions), or

(ii) representatives of such constituent or affiliated organisations, and whose principal purposes include the regulation of relations between workers and employers or between workers and employers' associations, or the regulation of relations between its constituent or affiliated organisations." (Emphasis added)

11. To be a trade union, therefore, the organisation must consist "wholly or mainly of workers" at the time in question.

12. A "worker", for the purposes of s.1 and s.3 of **TULRCA** (and indeed for all purposes under the Act), is defined in s.296, which provides:

> **"(1) In this Act "worker" means an individual who works, or normally works or seeks to work—**
>
> **(a) under a contract of employment, or**
>
> **(b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or**
>
> **(c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above.**
>
> **(2) In this Act "employer", in relation to a worker, means a person for whom one or more workers work, or have worked or normally work or seek to work." (Emphasis added)**

13. It is clear, therefore, that save for those falling within the terms of subsection (1)(c), work must be done under a contract in order to be a worker.

14. There are many statutory provisions governing the relationship between foster carers and local authorities and foster carers and looked after children. It is sufficient for present purposes to refer just to the following.

15. Section 17 of the **Children Act 1989** ("**the 1989 Act**") provides that it is the general duty of the local authority to safeguard and promote the welfare of children within their area who are in need and, so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.

16. Section 22(3)(a) of the **1989 Act** provides that a local authority has a duty to safeguard and promote the welfare of a looked after child. Section 22A sets out the local authority's duty to provide accommodation to such a child.

17. A foster parent is defined by Regulation 2(1) of the **Fostering Service (England) Regulations** ("**the 2011 Regulations**") as a person approved as a foster parent under the regulations.

18. Under regulation 27 (5) of the **2011 Regulations**:

> **"(5) if a fostering service provider decide (sic) to approve X as a foster parent they must –**
>
> **(a) give X Notice in writing specifying any terms on which the approval is given, and**
>
> **(b) enter into a written agreement with X covering the matters specified in Schedule 5 (the "FCA")."**

19. Schedule 5 to the **2011 Regulations** stipulates that the FCA must provide for the following:

> **"1. Matters to be recorded**
>
> **(a) The terms of the foster parent's approval.**
>
> **(b) The support and training to be given to the foster parent.**
>
> **(c) The procedure for the review of approval of a foster parent.**
>
> **(d) The procedure in connection with the placement of children and the matters to be included in any placement plan.**
>
> **(e) The arrangements for meeting any legal liabilities of the foster parent arising by reason of a placement.**
>
> **(f) The procedure available to foster parents from making complaints and representations.**
>
> **2. Obligations on the foster parent**
>
> **(a) To care for any child placed with them as if the child was a child of the foster parent's family and to promote that child's welfare having regard to the long and short-term plans for the child.**
>
> **(b) To give written notice to the fostering service provider without delay, with full particulars, of—**
>
> **(i) any intended change of the foster parent's address,**
>
> **(ii) any change in the composition of the household,**
>
> **(iii) any other change in the foster parent's personal circumstances and any other event affecting either their capacity to care for any child placed or the suitability of the household, and**

(iv) any request or application to adopt children, or for registration as an early years provider or a later years provider under Part 3 of the Childcare Act 2006.

(c) Not to administer corporal punishment to any child placed with the foster parent.

(d) To ensure that any information relating to a child placed with the foster parent, to the child's family or to any other person, which has been given to them in confidence in connection with a placement is kept confidential and is not disclosed to any person without the consent of the fostering service provider.

(e) To comply with the terms of any placement plan.

(f) To comply with the policies and procedures of the fostering service provider issued under *regulations 12 and 13*.

(g) To co-operate as reasonably required with the Chief Inspector and in particular to allow a person authorised by the Chief Inspector to interview the foster parent and visit the foster parent's home at any reasonable time.

(h) To keep the fostering service provider informed about the child's progress and to notify it as soon as is reasonably practicable of any significant events affecting the child." (Emphasis added)

20. We refer, finally, in this section, to the two Articles of **ECHR** relevant to this appeal. Article 11, **ECHR** provides:

"Freedom of assembly and association

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."

and Art 14, **ECHR** provides:

"Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Grounds of Appeal

21. The decision of the Certification Officer may be appealed on any question of law arising from the decision: see s.9 of **TULRCA**.

22. The Appellant's Notice of Appeal was lodged on 17 August 2017. Permission to appeal was granted by Simler J, as she then was, at a preliminary hearing on 18 April 2018. The Grounds of Appeal went through various amendments. The list of issues to be determined was set down by Swift J in discussion with the parties at a case management hearing on 5 February 2019. The issues to be determined are as follows:

a. Ground 1 - Did the Respondent err in law in his decision of 10 July 2017 in holding that the Appellant's members were not wholly or mainly workers as defined in s.296 of **TULRCA** because they did not work under a contract?

b. Ground 2 - If Ground 1 is not successful, did the Respondent err in law in making a decision that was in breach of s.3 of the **Human Rights Act 1998** ("**HRA**"). In particular:

    i. Did the decision amount to a breach of Art 11 and/or Art 14 of the **ECHR**; and, if so

    ii. Is it possible to achieve an **ECHR**-compliant reading of s.296 of **TULRCA** by reading in the words, "or employment relationship" in the definition of worker so as to include non-contractual employment relationships?

23. We shall deal with each ground in turn.

Ground 1 - Do foster carers work under a contract?

The W v Essex line of authority

24. The Respondent considered himself bound by the line of authority commencing with **W v Essex County Council** [1998] 3 WLR 534. In that case, foster carers had been assured that a child placed in their care did not have a history of committing sexual abuse. That turned out not to be the case and the looked after child sexually abused the foster carers' children, who were then aged between 7 and 12. The foster carers brought claims against the local authority under various heads including breach of contract. The Court of Appeal rejected the claim in contract. Stuart-Smith LJ, having considered the terms of the Specialist Foster Carer Agreement between the foster carers and the local authority, held as follows:

> **"50. There are, in my judgment, a number of reasons why the plaintiffs' claim in contract must fail. First, although the Specialist Foster Carer Agreement had a number of features which one would expect to find in a contract, such as the payment of an allowance and expenses, provisions as to national insurance, termination and restriction on receiving a legacy or engaging in other gainful employment and other matters to which the judge referred *[1997] 2 F.L.R. 535* , 565e-f, I do not accept that this makes the agreement a contract in the circumstances of this case. A contract is essentially an agreement that is freely entered into on terms that are freely negotiated. If there is a statutory obligation to enter into a form of agreement the terms of which are laid down, at any rate in their most important respects, there is no contract: see *Norweb Plc. v. Dixon [1995] 1 W.L.R. 636* , 643f.**
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> **51. In S. v. Walsall Metropolitan Borough Council [1985] 1 W.L.R. 1150 the question was whether foster parents were the agents of the defendant council who had placed the child in care. Oliver L.J., with whose judgment Balcombe L.J. agreed, reviewed the statutory provisions which are similar to those relevant in this case. He said, at p. 1154f, that the statute and the regulations "provide a statutory code and they underline the fact that the whole of this area is covered by a complicated and detailed statutory scheme." and later he said, at p. 1155e, that the "relationship between the child and the local authority, and indeed between the child and the foster parents, is one which is regulated . . . simply and solely by the provisions of the statutory scheme." It is true that he does not include the relationship between the foster parents and the council as being so regulated; but it must, in my judgment, follow. The contents of the agreement are strictly laid down in the regulations and cannot be varied. The remuneration is set by the statutory scheme and cannot be freely negotiated."**

25. The Court of Appeal's decision in **W** that the FCA required by statute is not a contract between the foster carer and the relevant local authority has been applied in a number of cases since that decision:

a. The first of these was **Rowlands v City of Bradford MDC** [1999] EWCA Civ 1116. The issue in that case was whether a foster carer was employed under a contract for

the purposes of a race discrimination claim against the local authority. The Court of Appeal, Stuart-Smith LJ presiding, held, following **W**, that the foster parent/local authority relationship was not a contractual one. Although Counsel for the foster carer in that case had conceded that the court was bound by its own decision in **W**, Stuart-Smith stated that that "concession was rightly made".

b. The next case is that of **Lambert v Cardiff County Council** [2007] 3 FCR 148. The background to that decision was that a child placed in the care of approved foster carers had a history of violence towards children. That history had not been disclosed by the local authority. The foster carers suffered psychiatric injury. They brought complaints against the council on various grounds including breach of contract. Hickinbottom J (as he then was) accepted that the FCA in that case had "some of the characteristics of a private law contract", but held that the ratio of the **W** case applied directly to the FCA with which he was concerned, and considered that decision to be indistinguishable and binding upon him. Hickinbottom J went on to say:

> **"117. However, in any event, even if W were not binding upon me, I would respectfully adopt its reasoning. The February 1991 and May 1995 agreements contained primarily provisions required by the respective statutory schemes. Stuart-Smith LJ allowed for the fact that there might be some provisions in the agreement that were not so mandated. These agreements were not private law contracts. The relationship between authority and carers is not regulated by private law, but by the comprehensive statutory scheme, of which these agreements formed part."**

c. The final case to be considered in this line of authority is **Bullock v Norfolk County Council** UKEAT/230/10, a judgment of the EAT. There, a foster carer sought to establish that she was a worker within the meaning of s.230(3) of the **Employment Rights Act 1996** ("**ERA**") so as to confer on her a right to be accompanied to a meeting, pursuant to s.10 of the **Employment Relations Act 1999**. Slade J held that the foster parent was not a worker because there was no contract in play. In coming to that decision, Slade J specifically rejected a suggestion that **W** and **Rowlands** were

no longer good law and/or binding on the EAT. The basis for suggesting that **Rowlands** was not good law was that it was based on a concession made by the Appellant in that case and should not therefore be regarded as part of the ratio. However, Stuart-Smith LJ in **Rowlands** considered that the concession was rightly made. As such, the ratio of the case is binding upon the lower courts notwithstanding the fact that it arose out of a concession: see **R (Kadhim) v Brent London Borough Council Housing Benefit Review Board** [2001] QB 955. At [42] of the judgment, the EAT also endorsed a suggestion by the Employment Tribunal below that the nature of the role of the foster parent fitted uneasily with the concept of employment and the system of individual employment protection.

26. Ms Crasnow QC, for the Appellant, submits that the **W** line of authority is not binding upon this Court for two reasons:

a. First, it is said that **W** and the subsequent cases were concerned with the status of an individual foster carer and the agreement under which that carer worked, whereas the Respondent here was considering whether all or most foster carers work under contract such that the Appellant, as a specialist foster carer union, would be eligible for inclusion on the List;

b. Second, it is submitted that the Respondent was considering different statutory provisions from those in force at the time of the previous decisions.

27. In our judgment, neither of these reasons provides a sound basis for not regarding these decisions as binding upon the EAT. The fact that the Respondent was considering whether foster carers as a class worked under a contract makes no substantive difference; the answer to that question is dependent upon the contractual position of each individual foster carer in that class.

A Thus, the question before the Respondent was essentially the same question being considered by the Courts in the **W** line of authority; namely, whether foster carers worked under a contract.

28. Similarly, the fact that different regulations were in force at the time of the earlier decisions B makes no substantive difference. That is for the simple reason that the effect of the legal provisions, which is to dictate, to a very large extent, the terms of the relationship between the foster carer and the local authority, is the same now as it was then.

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29. It has not been submitted by the Appellant that the factual circumstances pertaining to its members are significantly different so as to enable the EAT to regard the Appellant's case as distinguishable from earlier authority. The Respondent expressly requested the Appellant to D provide any information which might suggest that the position was different, but none was forthcoming. On 10 February 2017, the Respondent informed the Appellant that it would need to explain why it contends that the factual basis on which the earlier cases were decided had E changed. Specifically, the Appellant was asked whether the "*relationship between foster carers and local authorities changed such that it can now be described as a contract*". The Appellant was asked to set out exactly what these changes were with supporting evidence. That question was reiterated, albeit briefly, in a further letter dated 2 May 2017. The Appellant's response did F not provide any evidence in support of its contentions. That remains the position before the EAT. The evidence of Mr Findlay does not contain any material that could give rise to a conclusion that the FCA now in place was significantly different from ones considered previously. As the G Respondent found:

> **"On the information before me it appears that the relationship between foster carers and local authorities continues to be regulated by the Special Foster Care Workers Agreement which has already been examined by the courts. The cases of Rowlands and W (as applied in Bullock) are direct authority for the relationship between foster carers and the local authority not being contractual. Therefore, I remain bound by the existing case law. In those circumstances, I am bound to reject this application for listing."**

H

30. In the circumstances, where the foster carer agreement considered by the Respondent appears to be indistinguishable (at least in general terms) from those considered in earlier authorities, and where there is no proper basis for regarding those authorities as not binding upon this Tribunal, Ground 1 of the Appeal must fail.

31. Ordinarily, that would be the end of Ground 1. Ms Crasnow also submits, however, that even if the Appellant is wrong to suggest that the EAT is not bound by precedent, the **W** line of authority is wrong as a matter of law and the EAT should say so in its judgment, as this would be likely to assist any court hearing any further appeal.

32. We do not share Ms Crasnow's confidence that any views that we might express would be likely to assist other courts. We say that for two reasons: the first is that this is not a case where the facts have been closely examined. The Respondent's analysis, despite his best efforts, was necessarily based on very limited information as to the specific nature of the relationship between foster carers and Foster Care Providers ("FCP"). Without a firm factual foundation, any conclusions as to the contractual position of the foster carers, however strongly expressed, would carry very little weight indeed. The second reason is that the question of whether or not the relationship between foster carers and FCPs is governed by a contract is not a specialist employment law question which this tribunal might be better placed to consider than other non-specialist courts. Instead, it is a general question of contract in relation to which this tribunal, in the absence of detailed findings of fact, is in no better position than any other court to determine.

33. That said, as we are in agreement with the **W** line of authority, and out of deference to the extensive submissions made on the issue, we express our views briefly as follows.

34. Ms Crasnow's principal submission is that the law took a wrong turn when **W** was decided in that that decision was the result of an erroneous application of the earlier case of **Norweb Plc**

v Dixon [1995] 1 WLR 636. In **Norweb**, the issue was whether there was a relationship based on contract between a public electricity supplier and a tariff customer. Dyson J (as he then was), giving the judgment of the Divisional Court, held as follows at 642G to 643H

> **"Conclusion on the contract point**
>
> **I deal first with the general question whether an agreement for the supply of electricity between a tariff customer and a public electricity supplier (i.e. not a special agreement within the meaning of section 22) is a contract. There are many examples of cases where the law to some extent restricts the freedom of parties to enter into a relationship, but where the relationship that results is a contract. Mrs. Cover gave some good examples, although I do not consider that her point about section 65 of the Housing Act 1985 is apt. A further good example is that it is unlawful to refuse a person employment "because he is, or is not, a member of a trade union:" section 1(1)(a) of the Employment Act 1990. In all these cases, a relationship which results from some degree of legal compulsion is nevertheless regarded as contractual, because the parties still have considerable freedom to regulate its incidents.**
>
> **But there are other cases in which a relationship created by legal compulsion is clearly not contractual. Thus a person whose property is compulsorily acquired against his will does not make a contract with the acquiring authority, even though he receives compensation: see *Sovmots Investments Ltd. v. Secretary of State for the Environment [1977] Q.B. 411*, 443. In *Pfizer Corporation v. Ministry of Health [1965] A.C.* 512 the House of Lords held that a patient to whom medicines are supplied under the National Health Service does not make a contract to buy them either from the chemist or the Minister of Health even if he pays a subscription charge. The transaction is sui generis, the creation of statute and not a sale pursuant to a contract. Lord Reid said, at pp. 535–536:**
>
> > **"I shall consider the case on the footing that a patient is not entitled to demand the drug unless he tenders 2s. The appellants' argument is that when the patient pays 2s and gets the drug there is a sale of the drug to him by the hospital or the chemist and that 2s is the price. If that were right, the appellants say that section 46 does not authorise the department or its servants or agents to sell or vend, it only authorises them to make, use or exercise the invention. But in my opinion there is no sale in this case. Sale is a consensual contract requiring agreement, express or implied. In the present case there appears to me to be no need for any agreement. The patient has a statutory right to demand the drug on payment of 2s. The hospital has a statutory obligation to supply it on such payment. And if the prescription is presented to a chemist he appears to be bound by his contract with the appropriate authority to supply the drug on receipt of such payment. There is no need for any agreement between the patient and either the hospital or the chemist, and there is certainly no room for bargaining. Moreover the 2s is not in any true sense the price: the drug may cost much more and the chemist has a right under his contract with the authority to receive the balance from them. It appears to me that any resemblance between this transaction and a true sale is only superficial. I would therefore decide against the appellants on this point."**

> **The issue in this case is: which side of the line does the relationship between a tariff customer and a public electricity supplier fall? In my judgment, the legal compulsion as to both the creation of the relationship and the fixing of its terms is inconsistent with the existence of a contract. As regards the creation of the relationship, the supplier is obliged by section 16(1) of the Act of 1989 to supply if requested to do so. The exceptions from the duty to supply provided in section 17 are very limited in scope. Mrs. Cover submits that section 17(2)(c) gives the supplier what she calls a "discretion" not to supply. That is not so. A supplier is excused from supplying if (the burden being on him) it is not reasonable in all the circumstances for him to be required to do so. What is reasonable is a question of fact to be established objectively. Discretion does not come into play. Thus, save in certain narrowly defined circumstances, if a consumer requests the supply of electricity, the supplier is obliged to supply."**

35. Ms Crasnow submits that a proper application of that decision requires an analysis of which side of the line between contract and non-contract the circumstances of the relationship in question falls. Furthermore, she submits that the key factors leading to the decision in **Norweb** that the relationship between the electricity company and tariff customer fell on the non-contractual side of the line were the compulsion imposed on the company to enter the agreement and the absence of any freedom to negotiate terms. It is said that those factors are not present in the case of foster carers and that the decision in **W** ought to have been that there is a contract in their case. Ms Crasnow relies upon the fact that a local authority is not compelled to enter into an agreement with any particular foster carer and that the foster carer may choose, if he or she so wishes, to enter into an agreement with a different local authority. It is also said that the lack of freedom to negotiate terms should not be decisive given that, as with other employment relationships, the inequality of bargaining power means that one party is generally deprived of any choice as to the terms on which to enter into the contract.

36. We cannot accept the Appellant's analysis. We accept that a local authority is not obliged to enter into an agreement with any particular foster carer and similarly that a foster carer may choose to enter into an agreement with a different local authority. However, the absence of compulsion at that stage does not necessarily mean that there is a voluntary contract between the parties. Compulsion to enter into an agreement with a particular party may be a relevant factor in

deciding which side of the line the agreement falls, but it is not necessarily determinative. That much is clear from Dyson J's observation, at 642H of **Norweb**, that there are cases where a relationship results from some degree of legal compulsion but is nevertheless regarded as contractual.

37. Ms Crasnow's further point about the inability to negotiate terms does not assist her case. It seems to us that there is a marked difference between a situation where, as a result of inequality of bargaining power, one party's ability to negotiate terms is restricted, and one where most or all the significant terms of relationship are dictated by statute. Based on the material before us, it seems clear that the relationship between foster carers and FCPs or local authorities is one that is strictly governed by a complex statutory framework. That would tend to militate against a conclusion that there was the degree of freedom which one might expect if the relationship was contractual.

38. We therefore do not consider that **Norweb** was misapplied in subsequent decisions.

39. We also do not accept Ms Crasnow's submission that the **W** line of authority is to the effect that where there is statutory underpinning of a relationship there is no contract. There are, of course, many situations where a relationship may be contractual notwithstanding the fact that some or even many aspects of the relationship are dictated by statute; a normal relationship of employment in which there are statutorily imposed terms as to equality of treatment is an example. However, the question of which side of the **Norweb** line the particular relationship falls will depend on the circumstances of that relationship. **W** was not decided simply on the basis that there was statutory underpinning; Stuart-Smith LJ in that case carefully considered the terms of the agreement and noted, amongst other things that the foster carer had, for example, a right to decline any placement of a child provided such objection was not made unreasonably: see **W** at

112F. However, the conclusion was that there was, nevertheless, a statutory obligation on the parties to enter into a form of agreement "*the terms of which are laid down, at any rate in their most important respect*". Stuart Smith LJ also considered the finding in **S v Walsall Metropolitan Borough Council** [1985] 1 WLR 1150, in which it was held that the statute and the regulations "*provide a statutory code and they underline the fact that the whole of this area is covered by a complicated and detailed statutory scheme*"[2].

40. Similarly, none of the other decisions in the **W** line of authority can be said to have been decided simply on the basis that there was statutory underpinning of the relationship. Thus, **Rowlands** was decided on the basis of a concession that was considered to have been "*rightly made*"; **Lambert** was decided on a detailed analysis of the relevant agreement and was not a slavish application of **W**: and in **Bullock**, the EAT expressly considered and rejected the argument that **W** and **Rowlands** were no longer good law. In relation to the last of those cases, whilst not strictly binding upon this tribunal, we could only depart from it if it could be said to be *per incuriam*, manifestly wrong or if there were other exceptional circumstances: **Lock v British Gas Trading (Number 2)** [2016] IRLR 316, EAT at [75]. There are no such circumstances here.

41. Ms Crasnow also referred to the case of **Johnstone v Glasgow City Council**, a first instance decision of the Glasgow Employment Tribunal, as an example of a decision where it was found that the relationship between foster carers and an organisation known as Connex MTFC was a contract, notwithstanding the statutory underpinning of the relationship. However, the circumstances of that case were very different from the standard foster carer/local authority

[2] See also **Armes v Nottinghamshire County Council** [2017] UKSC 60 at [52] in which the conclusion of Oliver LJ in **S v Walsall** (at p.1155) that the statutory scheme was "*entirely inconsistent with the notion that the foster parents are in any way the agents of the local authority in carrying out their duties*", was cited with apparent approval. The absence even of an agency relationship in this context lends further support to the conclusion that there is no contractual relationship between the parties.

relationship as the Employment Tribunal in that case expressly acknowledged. One key difference was that the foster carers party to the agreement with Connex MTFC were paid an annual salary of £32,000. The tribunal found that the Connex agreement referred to many matters which go considerably beyond the scope of the relevant regulations that would otherwise set out the terms of the agreement between the foster carer and FCP. The tribunal held at [55]:

> **"In my view the claimant's argument succeeds in its first leg in that there are clear factual differences between the situation in the present case and the situation set out in the previous case law [this was a reference to the W line of authority]. It may very well be the case that if one is looking at a mainstream foster carer then the correct legal analysis is that there is no contractual nexus between the parties. In this case however given the very specialist nature of the Connex NTSC scheme and the many matters in the agreement which are not covered by the statutory scheme that appears clear to me that the parties intended to enter into a contractual relationship over and above the relationship imposed by the statutory scheme and did in fact do so."**

42. In our judgment, the facts of that case provided a clear basis for taking a different approach to that taken in the **W** line of authority. It was not submitted before us that there is anything in the agreements to which the Appellant's members or potential members were party contained any, let alone many, matters not covered by the statutory scheme.

43. For these reasons, we consider that, even if we had not been bound by it, the **W** line of authority is correct and ought to be followed.

44. Ms Crasnow, in comprehensive and helpful submissions, referred to a number of further cases in support of the contention that there was a contract. We deal with a few of these very briefly:

45. **Preston v President of the Methodist Conference** [2013] ICR 833. In this case the Supreme Court held that a Minister was not employed under a contract for the purposes of s.230 of **ERA** and was therefore not entitled to pursue a claim for unfair dismissal. At paragraph 10 of the Judgment, Lord Sumption said as follows:

> **"10… the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's**

> **occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers of religion generally: see, in particular, Baroness Hale at para 151. The primary considerations are the manner in which the Minister was engaged and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence on the party's intentions fall to be construed against their factual background. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion.**
>
> **…**
>
> **12 …The question is whether the incidence of the relationship described in those documents, properly analysed, are characteristic of contract and, if so, whether it is a contract of employment. Necessity does not come into it."**

46. Ms Crasnow submits that in the same way that one cannot presume that the status of office or the spiritual nature of the role precludes a contract, so too must one avoid any presumption in the present case that the existence of a statutory framework and/or of a special parental obligation on the part of the foster carer precludes a contract. Instead, she submits, one must construe the documents against their factual background in the usual way. In our judgment, this case does not assist the Appellant. In none of the cases binding upon this Tribunal did the Court apply any presumption against a contract, whether on the basis of the existence of a statutory framework or otherwise. We do consider that it is a relevant part of the background that the obligations on a foster carer are fundamentally different and more extensive than those that would arise out of a normal work/wage relationship. One cannot ignore the fact that the principal obligation on a foster carer is to care for any child placed with them *as if the child was their own*: paragraph 2(a) of Schedule 5 to the **2011 Regulations**. We also note that there is some evidence before us, contained in a 2017 report entitled "The Fostering System in England: Evidence Review" and in a 2018 review by Sir Martin Narey, entitled "Foster Care in England" that an employment relationship (within the context of domestic law) would be inimical to the special relationship between foster carer and looked after child. We cite one example of a looked after child expressing what it felt like to be fostered:

> **"It just feels like I'm living with my family and not with someone who gets paid to look after me."**

47. We acknowledge the criticisms made by the Fourth Intervenor, ECRU, that such evidence cannot be said to be conclusive and that there is some evidence suggesting the opposite, namely that the security offered by worker/employee status would benefit the relationship rather than damage it. We are not in a position to reach any conclusion as to whether worker status would be beneficial or harmful to the special relationship between foster carer and looked after child; that is not what this appeal is about. However, we do share the concern expressed by the Employment Tribunal in the **Bullock** case that the role of a foster parent fits uneasily with the concept of employment and the system of individual employment protection.

48. We were referred to the decision of the CJEU in **Sindicatul Familia Constanta v Directia Generala de Asistenta Sociala si Protectia Copilului Constanta** [2019] ICR 211, in which it was held that foster parents in Romania, who had contracts with a public institution, were workers for the purposes of the **Working Time Directive (Directive 2003/88)**. To be a worker for these purposes, it is sufficient that there is an 'employment relationship' under which for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration: at [41]. There is no need for such a relationship to arise out of a contract. In reaching that conclusion the CJEU held that the fact that the work performed by foster parents is largely comparable to the responsibilities undertaken by parents with regard to their own children is not sufficient to prevent them from being qualified as workers of the Directive. However, the CJEU went on to find that the characteristics peculiar to the work of foster parents must be regarded as precluding the application of the Directive to them such that they were not eligible for benefits such as weekly rest days, public holidays and other non-working days: at [76]. Conferring such entitlements on foster carers would go directly against the objective of ensuring that a child placed with a foster parent was integrated, on a continuous and

long-term basis, into the home and family that foster parent to allow the child to develop in a caring and educational environment conducive to harmonious development: at [72].

49. Ms Crasnow acknowledges that this decision is not of direct assistance to her because the provision with which we are concerned, namely s.296 of **TULRCA**, is a provision of domestic law and is not derived from EU law. She does contend, however, that the CJEU's decision emphasises that the parental role of the foster carer is not enough in itself to preclude an employment relationship within the meaning of EU law. We are bound to agree with that proposition. However, that does not mean that the parental nature of the role is not a significant and important factor to be taken into account. Indeed, it is clear from the CJEU's decision that foster carers were not entitled to the benefits of the Directive and that the parental nature of the role is a peculiar characteristic of the relationship which can mean that the normal incidents of an employment relationship (in the broader EU sense) do not apply. That, to our mind, is consistent with the concern expressed above that the special nature of the foster care relationship sits uneasily with the concept of employment and the system of individual employment protection. We would reiterate, however, that this is no more than a concern based on the limited factual material before us and should not be seen as in any way precluding a finding, in an appropriate case, that a foster carer is a worker under a contract.

Ground 2 – Is there a breach of Art 11, ECHR?

50. This ground only arises in the event that Ground 1 fails and the conclusion is that foster carers do not work under a contract. If there is found to be a breach, the question that arises is whether, pursuant to s.3 of **HRA**, s.296 of **TULRCA**, which requires that workers work under a contract, can properly be construed to give effect to rights under Art 11, **ECHR**. If the section cannot be so construed then the question is whether it ought to be declared incompatible with **ECHR**.

A Notwithstanding the fact that the EAT has no power to make such a declaration, the Appellant invites the EAT to comment on whether it would, had it been so permitted, make such a declaration.

B 51. The questions to be determined, as set out in the list of issues, are as follows:

a. Is Art 11 is engaged at all?

b. If so, were the Appellant's Art 11 rights interfered with, and if so which of those rights

C were involved?

c. Was such interference justified within Art 11(2)?

52. We shall deal with the issues in that order.

D

Is Art 11 engaged?

E 53. Foster carers are not prevented from forming associations; there are already several such associations in existence, including the Foster Care Network. The stated aim of the Appellant is set out as follows:

> **"The intention of the NUPFP is to encourage discussion between employers, agencies and workers to establish a common ground based on current law so that**

F **no person is disadvantaged and to work together to improve working practices on all sides and introduce new legislation through parliament in the longer term where necessary".**

54. Mr Collins QC, on behalf of SSE, submits that the Appellant's stated aims in this case are all

G ones that could be achieved by such associations without the need for any trade union at all. As such, it is said that the right under Art 11 to form and join a trade union is not engaged at all. Our attention was directed to the following passage in the judgment of the ECtHR in the case of

H **Gorzelik v Poland** (2004) 38 EHRR 4:

> **"55. The Court recalls at the outset that the right to form an association is inherent in the right laid down in Article 11, even if that provision only makes express reference to the right to form trade unions.**

> **The most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no practical meaning."**

55. It is said that in the present case that there is nothing to prevent foster carers from creating such a legal entity to promote their collective interests.

56. The Appellant contends, however, that it is the right under Art 11 to form a trade union that is engaged by the Respondent's refusal to enter it on to the List. The principal submission made by the Appellant and the IWGB in support of their contention that Art 11 is engaged is that, notwithstanding the absence of any contract, there is, as between the foster carer and the FCP or local authority, a clear "employment relationship" in respect of which the right to form and to join a trade union under Art 11 is engaged.

57. Reliance is placed upon the case of **Sindicatul Pastorul Cel Bun v Romania** [2014] IRLR 49. In that case 32 Orthodox priests decided with others to form a trade union called Pastoral Cel Bun ("**The Good Shepherd**"). The union made an application to be granted legal personality and entered on to the register of trade unions. That application was initially granted. However, the Romanian appellate court revoked that registration, on the grounds that the establishment of the union would be contrary to Romanian Orthodox Church statute prohibiting priests from setting up associations of any kind. In relation to the applicability of Art 11, the ECtHR held as follows:

> **"140. The question whether the applicant union's members were entitled to form the union raises the issue of whether Article 11 was applicable to them. On this point, the Grand Chamber does not share the Government's view that members of the clergy must be excluded from the protection afforded by Article 11 of the Convention on the ground that they perform their duties under the authority of the bishop, and hence outside the scope of the domestic rules of labour law.**
>
> **141. It is not the Court's task to settle the dispute between the union's members and the Church hierarchy regarding the precise nature of the duties they perform. The only question arising here is whether such duties, notwithstanding any special features they may entail, amount to an employment relationship rendering applicable the right to form a trade union within the meaning of Article 11.**

> **142. In addressing this question, the Grand Chamber will apply the criteria laid down in the relevant international instruments (see, *mutatis mutandis*, *Demir and Baykara*, cited above, § 85). In this connection, it notes that in Recommendation no. 198 concerning the employment relationship (see paragraph 57 above), the International Labour Organisation considers that the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties. In addition, the ILO's Convention no. 87 (see paragraph 56 above), which is the principal international legal instrument guaranteeing the right to organise, provides in Article 2 that "workers and employers, without distinction whatsoever" have the right to establish organisations of their own choosing. Lastly, although Council Directive 78/2000/EC (see paragraph 60 above) accepts the existence of a heightened degree of loyalty on account of the employer's ethos, it specifies that this cannot prejudice freedom of association, in particular the right to establish unions.**
>
> **…**
>
> **148. Having regard to all the above factors, the Court considers that, notwithstanding their special circumstances, members of the clergy fulfil their mission in the context of an employment relationship falling within the scope of Article 11 of the Convention. Article 11 is therefore applicable to the facts of the case."**

58. Mr Hendy QC for the IWGB submitted that the reference in **The Good Shepherd** case to the clergy fulfilling their mission "*in the context of an employment relationship*" indicates that the ECtHR did not even require there to be an employment relationship for the Art 11 right to be applicable.

59. We are not persuaded that the reference to the phrase "*in the context of an employment relationship*" gives rise to that conclusion. It is clear from [140] and [142] of the judgment that the ECtHR was expressly considering whether or not the criteria for an employment relationship existed and that it was in that context that the members of the clergy fulfilled their mission. The Court was not saying that Art 11 rights would apply to some other relationship, not satisfying the criteria of an employment relationship.

60. Mr Hendy referred to two further cases in support of his submission that the Art 11 right to form and join a trade union applies irrespective of any underlying employment relationship. The first of these was the case of **Manole and Romanian Farmers Direct v Romania** (Application

46551/06). There, a group of self-employed farmers, who were not in an employment relationship with anyone, were barred from forming a trade union. The ECtHR held that this constituted an interference with Art 11(1) that had to be justified by reference to Art 11(2). The second case is **Vörður Ólafsson v Iceland** (Appn 20161/06) where an employer challenged the legitimacy of a compulsory subscription to an employers' association relying on ECtHR jurisprudence on trade unions. The Court also applied that jurisprudence in its assessment that there was an interference with the applicant's Art 11(1) rights. Mr Hendy's submission is that if the ECtHR is prepared to countenance the engagement of Art 11 trade union rights for self-employed farmers (as in **Manole**) and for independent businesses (as in **Ólafsson**), the same must apply in respect of foster carers working without a contract.

61. We do not accept that submission. As is made clear by the court in **The Good Shepherd** case, "*The only question… is whether such duties, notwithstanding any special features they may entail, amount to an employment relationship rendering applicable the right to form a trade union within the meaning of Art 11*" (at [141]). In **Manole**, the Court concluded as follows:

> **"62. The Court reiterates that article 11(2) of the Convention does not exclude any occupational group from the right of association secured under that article (See Sindicatul "Pastorul Cel Bun", cited above, [145]). In the present case, insofar as the applicants were refused the right to be registered as a trade union-type association, the Court considers that there was an interference by the respondent State the exercise of the rights guaranteed by article 11 of the Convention." (Emphasis added).**

62. We agree with Mr Collins' submission that the specific reference to the self-employed farmers seeking to register a "*trade union-type association*" in that passage, as opposed to a trade union *per se*, suggests that the ECtHR's focus was on the more general right of association rather than an infringement of the specific right to form a trade union. That interpretation is supported by the court's conclusion at [72] that the interference in that case was justified because the legislation in force at the time "*in no way restricted the applicants' right to set up trade associations*". Although the background in that case was an attempt to register a trade union, we

A do not consider that the court was, by its decision, intending to depart from the position that Art 11 trade union rights, as opposed to the more general right to form an association, would require an employment relationship.

B 63. Of course, that leaves the question whether the relationship between foster carers and local authorities in this case *is* an employment relationship. It will be noted that the Court in **The Good Shepherd** adopted the International Labour Organisation's Recommendation number 198 in C relation to the determination of the existence of an employment relationship. Paragraph 9 of that Recommendation provides:

> **"For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties."**

D

64. At paragraph 13, the Recommendation gives guidance as to the indicators which might point E to the existence of an employment relationship. These include the "*periodic payment of remuneration to the worker*"[3].

65. Mr Collins submits that the agreement between foster carers and the local authority in this F case does not involve the provision of work in return for periodic remuneration. He referred us to Mr Findlay's FCA. A section entitled "Finance Support" provides:

> **"Financial support is provided by the Directorate through the Foster Care Allowance, details of which are provided separately to each foster carer. Allowances are paid weekly in arrears. Details of other financial arrangements, including the provision of equipment and clothing can be made available on request.**
>
> **Retainer fees are payable to those foster carers who have been asked to hold a vacancy for a specific child by the supervising social worker and those foster carers who hold a vacancy for a child at boarding school or during a period of rehabilitation. Retainer fees are not payable if the foster carer is on holiday or is**

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H

[3] The CJEU has gone as far as to state that "the essential feature" of an employment relationship is that for a certain period of time one person performs services for and under the direction of another in return for which he receives remuneration: see **Holterman Ferho Exploitatie v Speis von Bullesheim** (Case C-47/14) [2016] ICR 90, [41].

> **otherwise unable to take a placement. From the age of 16 most young people will begin a pathway towards semi-independent and independent living. When a young person chooses to remain in foster care financial support can be made available for young people in further education, and this information is outlined in the department's staying put policy."**

66. Nothing further is said about allowances or fees in the agreement. It is clear that the allowances payable are intended to cover the costs of providing foster care, and that the retainer fee serves the limited function of providing some compensation for holding a vacancy for a child in certain circumstances. There is nothing in this agreement which represents any remuneration for the foster carer in return for providing the work of looking after a child.

67. There is evidence before us from Miss Katy Willison, Director of Children's Social Care, Practice and Workforce, of the Department for Education. She states that:

> **"40. The government has put in place a National Minimum Fostering Allowance… which each foster parent must receive in addition to any other necessary expense for the care, education and reasonable leisure interests of the child to cover the full cost of caring for the child. Fees may be paid in addition to allowances. Criteria for calculating all fees and allowances must be clear and transparent and applied equally to all foster carers in the service, regardless of whether the child is related to the carer or not, or the placement be short or long term.**
>
> **Benefits and tax**
>
> **41. The majority of foster parents are registered as self-employed for tax purposes. As foster parents, they receive Qualifying Care Relief that is made up of two parts:**
>
> **i. Tax exemption on the first £10,000 shared equally among any foster carers in the same household. No tax paid on the first £10,000 income from fostering.**
>
> **ii. Tax relief for every week a child is in their care. The amount depends on age (£200 a week for each child under 11 and £250 a week for each child aged 11 or over).**
>
> **42. Foster parents are entitled to claim means tested welfare benefits if they meet the general eligibility criteria. Income from fostering and foster children are not taken into account for the purposes of assessing benefits. Foster parents can claim child tax credit and child benefit for their own children but not for any foster children. Under Universal Credit, foster parents will have a reduced level of conditionality, designed to recognise their caring responsibilities and the valuable role they play in society."**

68. This evidence, submits Mr Collins, demonstrates that, as far as the foster carers here are concerned, there is no wage/work bargain and that therefore one of the key ingredients for an employment relationship is absent.

69. Mr Hendy submitted that the fact that fees are payable in addition to allowances and that foster carers are taxed as self-employed persons indicate that there is a wage/work bargain here. He also referred us to some evidence contained in a report produced by the Fostering Network, an association representing the interests of foster carers, in which it is said that foster carers' income from fostering comprises two elements: the allowance payable to all foster carers and which is designed to cover the cost of caring for a child; and a fee which recognises the "*time and skills of the foster carer*". The report notes that not all foster carers receive fees, that there are no national regulations relating to them and that the amount received across the UK varies widely. At 3.4.2 of the report it is said that around 60% of foster carers stated that they received a fee; this could range from less than £100 to over £1700 a month.

70. In our judgment, no clear conclusions can be reached in respect of the position as it applies generally to foster carers, save to say that while the majority of foster carers in the UK receive a small amount described as a "fee" on top of their allowance, many foster carers in the UK do not receive any fee at all. The amount of the fee when it is paid does not appear to bear any real relationship to the amount of work done. As for the foster carers who are members of the Appellant, there is no evidence that they receive any remuneration at all apart from the allowance and the retainer fee. Based on this limited information, we consider that there is force in Mr Collins' submission that, at least in relation to the FCA before us, the arrangement does not appear to be one representing remuneration for work done. However, there are insufficient facts for us to be able to determine the issue. A determination of whether there is an employment relationship will involve a multi-factorial analysis, including whether there is remuneration for work done.

There is no analysis of that type in the Respondent's decision, which was decided solely on the basis that there is no contract.

71. We do, however, agree with the Appellant and the IWGB that there is nothing in the Strasbourg authorities (nor indeed in the vast quantity of International Instruments to which we were referred[4]) that precludes the existence of an employment relationship where there is no contract. Indeed, the ECtHR in **The Good Shepherd**, relying upon Recommendation 198, expressly envisaged that such a relationship may exist irrespective of how it may be "*characterised in any contrary arrangement, contractual or otherwise*".

72. On the footing that a contract is not an essential prerequisite for the existence of an "employment relationship" (in the broader **ECHR** sense), it follows that the Appellant's members may, depending on the outcome of a fuller factual analysis (which might establish that there is, despite appearances, a work/wage arrangement), be found to be in such a relationship. If that is so, then the Art 11 right to join and form a trade union could potentially be engaged.

73. Whilst it is probably correct to say that the Appellant's stated aims could largely be achieved by means of an association rather than a trade union, that does not of itself mean that the right to form a trade union is not engaged. The ECtHR in **Tum Haber Sen v Turkey** (2008) 46 EHRR 19, said as follows:

> **"28. The Court reiterates that Art 11(1) presents trade union freedom as one form or a special aspect of freedom of association. The words "for the protection of his interests" which appeared in Art.11(1) are not redundant and the Convention safeguards freedom to protect occupational interests of trade union members by trade union action, the conduct and development of which the contracting states must both permit and make possible. A trade union must thus be free to strive for the protection of its members interests, and the individual members have a right, in order to protect their interests, that the trade union should be heard. Article 11 does not, however, secure any particular treatment of trade unions or their members and leaves each state a free choice of the means to be used to secure the right to be heard.**

[4] It is not necessary to lengthen this judgment with references to that material. Many of the provisions were comprehensively reviewed by the ECtHR in **Unite v UK** to which reference is made below.

> **29.The Convention makes no distinction between the functions of a contracting state as holder of public power and its responsibilities as employer. Article 11 is not an exception to that rule. On the contrary, para.2 *in fine* of this provision clearly indicates that the State is bound to respect the freedom of assembly and association of its employees, subject to the possible imposition of "lawful restrictions" in the case of members of its armed forces, police or administration.**
>
> **Article 11 is accordingly binding upon the "State as employer", whether the latter's relations with its employees are governed by public or private law."**

74. There can be little doubt, based upon that analysis, that the right to form and join a trade union is a special aspect of the right to form an association, which has as its particular objective the protection of the occupational interests of trade union members by trade union action. Such action cannot be taken by a mere association. In our view, if there is an employment relationship, the right under Art 11 to form and join a union would, potentially at least, be engaged notwithstanding the fact that many of the Appellant's objectives could potentially be achieved through an association.

75. Before leaving this issue, we should deal with two recent decisions of the High Court arising out of decisions of the Central Arbitration Committee. The first is **R (IWGB) v CAC and Roofoods Ltd (t/a/ Deliveroo)** [2019] IRLR 249 ("**Deliveroo**"). In that case the union, whose members included riders working under contract with Deliveroo, sought recognition for collective bargaining purposes pursuant to Schedule A1 to **TULRCA**. The union's application was rejected on the grounds that the riders were not workers. The CAC found that there was a genuine right of substitution which meant that there was no undertaking to provide work personally with the meaning of s.296 of **TULRCA**. It was argued before the High Court, on an application for judicial review of the CAC's decision, that the right under Art 11 to collective bargaining was not confined to workers in an employment relationship. That argument was rejected by Supperstone J who said as follows:

> **"36. I am not persuaded that any of the other cases to which Mr Hendy referred extend the right collectively to bargain beyond an employment relationship. In *Boots*, in the passage I have cited at para [31] above, Underhill LJ stated that the 'essential element' recognised by *Demir* was a right to bargain collectively with**

> **the employer. *Unite The Union* concerned the State's abolition of a right to bargain collectively which had previously been held by agricultural workers. As Mr Jeans observes the nature of the relationship between the agricultural workers and those with whom there had been negotiation on their behalf was not in issue.**
>
> **…**
>
> **39. Conclusion**
>
> **I do not consider that, on the findings made by the CAC, the Riders have the right for which the union contends under art 11(1). Neither domestic nor Strasbourg case law supports this contention. Article 11(1) is not engaged in this case."**

76. It can be seen that the absence of an employment relationship was determinative in that case. However, the Court there was able to proceed upon the basis of a clear factual conclusion as to the existence of a right of substitution and the absence, therefore, of worker status. There is no such conclusion in this case that would enable us to take the same approach.

77. The second decision is **R (IWGB) v CAC & Cordant Security Ltd and others** [2019] EWHC 728 (Admin), which was also decided by Supperstone J. There, the issue was whether employees who worked under a contract with a service company engaged by the University of London could nevertheless seek recognition by the University for collective bargaining purposes. On the basis that there was no contractual relationship with the University the Court held that Art 11 was not engaged: see [75]. That decision does not assist the analysis in the present case because we are not concerned with whether a relationship between the foster carers and some third party (with whom there is no contractual relationship) was an employment relationship, but whether the relationship with the local authority was one. The latter could, depending on the facts, amount to an employment relationship notwithstanding the absence of contract.

78. We turn therefore to consider whether there would be any interference with Art 11 rights if engaged.

Was there any interference with Art 11 rights?

79. The impugned act in this case is the refusal to enter the Appellant on the List. The question is whether that gives rise to any interference with Art 11 rights. The Appellant contends that the refusal to enter the Appellant on to the List deprives it, and consequently its members (actual and prospective), of certain benefits, including the following:

a. the right not to have another trade union adopt the same name for entry onto the List: s.3(4) of **TULRCA**;

b. the fact that inclusion on the List is evidence (in Scotland, sufficient evidence) that the organisation is a trade union: s.2(4) of **TULRCA**;

c. the right to apply to the Respondent for a certificate of independence: s.6, of **TULRCA**;

d. the right, upon obtaining a certificate of independence, to seek recognition to be entitled to conduct collective bargaining under Schedule A1 to **TULRCA**;

e. the right to seek compulsory recognition by an employer in the event that the employer does not enter into a voluntarily agreement for recognition;

f. the right to be provided with information and to be consulted, pursuant to reg.13 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006**;

g. the right, via an official, to accompany a worker at a disciplinary or grievance hearing pursuant to s.10 of the **Employment Relations Act 1999**; and

h. the right to be consulted in relation to proposed redundancies pursuant to S.188 of **TULRCA**.

80. Mr Hendy, on behalf of the IWGB, relies on a host of other benefits (not expressly relied upon or pleaded by the Appellant), which he contends are also denied to the Appellant by the refusal to enter it onto the List. These include the following:

a. The right to protection against the torts of inducing breach of contract, intimidation and conspiracy if a person is acting "*in contemplation or furtherance of a trade dispute*": s.219 of **TULRCA**. Mr Hendy acknowledges that in order to achieve that protection, a series of complex requirements (relating to the giving of notice and ballots etc) must be satisfied, and that strike action by foster carers could only be regarded as a "*theoretical*" possibility given the nature of their obligations. He submits, however, that there are forms of industrial action short of strike action which could be taken and which may result in the commission of torts in respect of which the protection conferred by s.219 would be a valuable benefit;

b. the right to the exclusion of common law rules as to restraint of trade: s.11 of **TULRCA**; and

c. various assorted rights in respect of Trade Union elections, discipline, finances, litigation and tax.

81. Mr Collins submits that many of these benefits may be enjoyed by a trade union without having to be listed. As such, they cannot be relied upon to demonstrate an interference with Art 11 rights. Even collective bargaining is not precluded by the absence of listed status. Reliance is placed upon the decision of the ECtHR in **Unite the Union v UK** [2017] IRLR 438. In that case, **Unite** (relying upon **Demir v Turkey** (2009) 48 EHRR 54) argued that the abolition of the Agricultural Wages Board, which constituted a forum for collective bargaining – confirmed in **Demir** to be an "essential element" of the right to join a union - amounted to an infringement of Art 11. The ECtHR was not persuaded by that argument stating as follows:

> **"59. The applicant has argued that the abolition of the AWB amounted to an interference with its right to engage in collective bargaining, an essential element of the freedom of association accorded to trade unions. The Court is not persuaded by this argument. In *Demir*, cited above, the Court found an interference with the applicants' trade-union freedom as a result of the absence of legislation necessary to give effect to the provisions of international labour conventions ratified by Turkey and a court judgment annulling the voluntary collective agreement entered into by the applicants on account of that absence. By contrast, in the present case the United Kingdom does not restrict employers and trade unions from entering into voluntary collective agreements. Legislation, in the form of s.179 in particular of the 1992 Act, is in place to govern the enforceability of collective agreements (see paragraph 26 above). Even where the conditions in s.179 are not satisfied, a collective agreement may nonetheless be enforceable in respect of a particular individual where he succeeds in showing that its terms have become incorporated into his employment contract (see paragraph 27 above). Thus the applicant is not prevented from exercising its right to engage in collective bargaining and the facts of the case are far removed from those at issue in Demir."**

82. Similarly, submits Mr Collins, the Appellant in this case can participate in voluntary collective bargaining irrespective of listed status and there is no interference with the Art 11 right. The principal benefit which is confined to those trade unions with listed status is compulsory recognition for the purposes of collective bargaining under Sch A1 to **TULRCA**, since only those unions with a certificate of independence can make a request for recognition under that Schedule: Para 6 of Sch A1. As to compulsory collective bargaining, there is (unless otherwise agreed) a limited range of matters to which such collective bargaining can apply, namely pay, hours and holidays: see para 3(3) of Sch A1. Mr Collins submits that such matters assume the existence of a contract between worker and the employer; and, as there is none in the present case, the notion of compulsory collective bargaining is rendered meaningless.

Discussion

83. Certain of the matters relied upon by the Appellant as amounting to an interference would only arise if its members were employees: these include the right to be provided with information and consultation under Reg 13 of TUPE. That right only applies to "affected employees", i.e. those who work under a contract of service. It has not been suggested at any stage that the foster

carers in this case are employees working under a contract of service; the highest that the case has been put (and indeed could be put) is that they are workers working under a contract personally to provide services: see Ground 1 above. Accordingly, it cannot be said that the Appellant (and/or its members) have been denied a right to which they might, but for the refusal to list, have been entitled. The same applies to the right to be consulted on redundancies pursuant to s.188 of **TULRCA**, which right, once again, applies only to employees.

84. As for the other matters relied upon, we shall deal, firstly, with the right to engage in collective bargaining, before going on to deal with some of the other matters identified by Mr Hendy in his submissions on behalf of the IWGB.

Collective bargaining

85. The first question to consider is whether the absence of a contract in the foster carers' case renders the notion of collective bargaining meaningless, such that the question of interference can be rejected *in limine*? In our view, it does not. The range of matters identified in s.178 as being amenable to collective bargaining contains several matters that would not necessarily require a contractual relationship in order for there to be negotiation about them. These could include, for example: allocation of work as between groups of workers (s.178 (c)); disciplinary matters (which can of course be non-contractual) (s.178(d)); whether or not a person is a member of a trade union (s.178(e)); and facilities for union officials (s.178(f)).

86. However, assuming that these matters can be the subject of negotiation regardless of contract, the question then is whether the refusal to list somehow precludes such negotiation with the authority or FCP on a voluntary basis. We cannot see that it does. As stated in **Unite**, the UK

A does not restrict employers and trade unions from entering into voluntary collective agreements. (See also **R(IWGB) v CAC & Cordant** at [52]). The refusal to list might deprive the Appellant of some consequential benefits of listing (as to which see below), but the scheme of **TULRCA** does not prevent voluntary negotiations and collective agreements from being entered into. To that extent therefore, there is no interference with the Art 11 right.

87. Of course, the refusal to list and the absence of a certificate of independence, do mean that the Appellant could not seek compulsory recognition for collective bargaining purposes. The question then is whether that would amount to an interference with the Art 11 right in the circumstances of this case.

88. It is necessary to bear in mind that the right to collective bargaining has been conclusively determined to be an "essential element" of the Art 11 right to form and join a trade union. The ECtHR's decisions in Demir and Unite were considered by the Court of Appeal in **Pharmacists Defence Association Union (PDAU) v Boots Management Service Ltd** [2017] IRLR 355 ("**Boots**"). As to Demir, the Court of Appeal concluded as follows:

> **"38. However, I do not think it would be right to treat the effect of the decision in *Demir* as being confined to cases where the state itself interferes with the freedom of a trade union to conduct collective bargaining already agreed. The reasoning goes wider than the facts of the particular case. The recognition of "the right to bargain collectively with the employer" as an "essential element" of the rights protected by article 11 means that it is a right of the same status as the more unspecific rights recognised in the earlier cases; and the Court evidently regarded this as a significant development. If the right in question is an essential element of the article 11 right the state may not simply be prohibited from itself interfering with it but may in principle have positive obligations to secure the effective enjoyment of those rights: that is the language of para. 41 of the judgment in *Wilson*, referred to at para. 31 above (which is clearer than, but to the same effect as, the phrase "both permit and make possible" which appears in the *Swedish Engine Drivers* decision – see para. 40). The extent of those positive obligations is another matter, which I consider further below."**

89. As to **Unite**, the Court of Appeal in **Boots** concluded as follows:

> **"45. The structure of that reasoning is not entirely explicit, but it seems to break down into three elements (the second and third being introduced by the words "moreover" and "furthermore"), namely:**

(1) that the UK has an effective system for giving effect to the results of voluntary collective bargaining;

(2) that the UK has a machinery under the 1992 Act for imposing compulsory collective bargaining, and that, although the minimum numbers threshold means that that machinery is not in practice available to agricultural workers, there was no reason to believe that that restriction was unjustifiable;

(3) that the union retained the right to advance its members' interests because it had the "right to be heard" – this harks back to the language of the *Swedish Engine Drivers* and *Wilson* cases (though these are not explicitly cited) – and that the international instruments did not support the view that "a state's positive obligations under Article 11 extend to providing for a mandatory statutory mechanism for collective bargaining in the agricultural sector".

46. At first sight the third of those points reads like a re-affirmation of the position established by the pre-*Demir* authorities and would support a reading of *Demir* which limited its effect to cases of positive interference by the state with voluntary collective bargaining arrangements. I do not however think that that is correct. If that had been the Court's understanding, the multi-factorial approach taken in para. 65 would have been unnecessary: the third point would have been conclusive by itself. There would have been no need for a reference to the UK's margin of appreciation nor to the striking of a fair balance. Nor would there have been any need, in relation to the second factor, to raise the question whether the restrictions which prevented the union being able to access the statutory machinery in the agricultural sector were justifiable. Indeed arguably the conclusion at the end of para. 58 that the complaint "may be said to fall within the scope of article 11", which is the gateway to the remainder of the Court's reasoning, would be falsified. It is necessary to note the three final words of the conclusion in para. 66 – "for agricultural workers": given the broader context to which I have referred, I think they must be read as equivalent to "in the circumstances of the present case".

47. In my view, therefore, the reasoning in the *Unite* case acknowledges the possibility that the absence or inadequacy of a statutory mechanism for compulsory collective bargaining might in particular circumstances give rise to a breach of article 11. Such a reading is consistent with the logic of the reasoning in *Demir* itself, as discussed at para. 38 above. It is fair to say that various observations by the Court, and indeed the outcome of the case itself, tend to suggest that complaints based on the denial of a right to compel an employer to engage in collective bargaining may face an uphill struggle; but the point at this stage is simply that the attempt is not excluded *in limine*."

90. Having considered those cases, the Court of Appeal expressed the following conclusion as to the scope of Art 11:

"54. My conclusions on this issue are largely determined by what I have already said about the effect of the Strasbourg authorities. It follows from the recognition by the Court in *Demir* that "the right to bargain collectively with the employer" is an "essential element" of the rights protected by article 11 that a complaint that domestic law does not accord such a right in a particular case will fall within the scope of article 11. But, at the risk of spelling out the obvious, it does not follow from that that article 11 confers a universal right on any trade union to be recognised in all circumstances. It is self-evident that any right to be recognised conferred by domestic law will have to be defined by rules which identify which unions should be recognised by which employers in respect of which workers and for what purposes. To the extent that the rules of any such scheme constrain access to collective bargaining for a particular union (or its

> **members) the constraints will have to be justified by – to use the language of the *Unite* decision (see para. 66, quoted at para. 44 above) – "relevant and sufficient reasons" and should "strike a fair balance between the competing interests at stake". But the decision also makes clear that in assessing any such justification the state should be accorded a wide margin of appreciation.**
>
> **55. Applying that conclusion to this case, if the PDAU can demonstrate that the inhibition which paragraph 35 imposes on what would otherwise be its right to seek compulsory collective bargaining under Schedule A1 is unjustifiable that would give rise to a breach of its article 11 rights. (I formulate it that way for convenience: no question about burden arose in this case.) In the paragraphs from his judgment which I quote at para. 50 above the Judge did not put it in quite the same way as I have, but I think that his approach was substantially the same. It is accordingly necessary to go on to consider the second issue."**

91. When it comes to compulsory collective bargaining, the range of matters amenable to collective bargaining is (unless otherwise agreed) narrowed to pay, hours and holidays. Does the absence of a contract necessarily preclude any right to seek compulsory collective bargaining? Once again, we do not consider that it does. Whilst pay, hours and holiday would normally be incidents of a contract, it is not a necessary condition that there be a contract before there could be negotiation about such matters. One can envisage a scenario whereby negotiations as to pay, hours and holidays result in an agreement of a non-contractual policy in relation to such matters. The agreement itself would be presumed to be non-contractual in effect: s.179. As for the individual foster carers who are not working under a contract, such a policy might give rise to a non-enforceable expectation of certain levels of pay, hours and holiday. We accept that this would be an unusual situation, but we do not see that the scheme of **TULRCA** specifically precludes such an outcome. This view is supported by the fact that the parties are entitled, pursuant to para 3(4) of Sch A1, to agree on a wider range of matters to be the subject of compulsory collective bargaining than simply pay, hours and holiday. Had it been Parliament's intention to confine the subject matter of negotiations under this paragraph of Sch A1 to those which are necessarily contractual, then the provision could quite easily have made reference to the "terms and conditions as to pay, hours and holiday".

92. However, the fact that compulsory collective bargaining could relate to non-contractual matters does not mean that the Appellant's Art 11 rights have been infringed by not permitting it to make a request under Sch A1. An infringement would only arise if the Art 11 right conferred an entitlement to request compulsory recognition for the purposes of collective bargaining. We were not taken to any authority suggesting that it does. On the contrary, as stated by Supperstone J in **Cordant**:

> **41. Mr Stilitz submits, and I agree, that the Article 11 challenge to paragraph 35 needs to be viewed against the background of the scheme of the recognition provisions as a whole, and the policy objectives underlying that scheme. The Strasbourg court has never held Article 11 to encompass a right to compulsory recognition of trade unions. In *Demir* the relevant breach of Article 11 occurred because the court struck down a collective agreement entered into voluntarily between the union and the employer. Similarly, in *Unite The Union v United Kingdom* [2017] IRLR 438, where the applicant's complaint was about the abolition of a compulsory form for collective bargaining in the agricultural sector, the court said (at para 65):**
>
> > **"The European and international instruments… do not support [the] view that a State's positive obligations under Article 11 extend to providing for a mandatory statutory mechanism for collective bargaining in the agricultural sector."**
>
> **42. Ms Emma Waite, Deputy Director of Employment Rights and Enforcement at the Department for Business, Energy and Industrial Strategy, explains in her witness statement the proposals for the new machinery for recognition of trade unions which were first set out in the White Paper, *Fairness at Work*, published on 21 May 1998. At paragraph 9 she summarises the policy objectives underlying Schedule A1:**
>
> > **"9. The changes implemented by way of Schedule A1 to the 1992 Act were envisaged to achieve the following policy objectives, among others:**
> >
> > **(a) the encouragement of voluntary arrangements for collective bargaining, which were to be given primacy;**
> >
> > **(b) the avoidance of competing and overlapping collective bargaining arrangements, and 'turf wars' between rival unions;**
> >
> > **(c) the encouragement of stability and continuity in collective bargaining arrangements;**
> >
> > **(d) the avoidance of small, fragmented bargaining units; and**
> >
> > **(e) the grant of greater rights to independent trade unions, as opposed to non-independent trade unions."**
> >
> > **These aims were reflected in the scheme of Schedule A1 to the 1992 Act (see, for example, para 25 above).**
>
> **43. Mr Stilitz submits that Schedule A1 to the 1992 Act contains a detailed and comprehensive scheme which provides, in defined circumstances, for a trade union to apply for compulsory recognition from an employer for collective bargaining purposes. Where matters cannot be determined by agreement,**

> **applications for recognition are determined by the CAC, provided various complex pre-conditions are satisfied.**
>
> **44. The state's obligations under Article 11 are limited, and do not extend to a positive obligation to require compulsory collective bargaining in all circumstances (see *Unite The Union v United Kingdom* at paras 59-60 and 65-66). Whilst the right to collective bargaining falls within the ambit of Article 11, there is no universal or unqualified right to compulsory recognition."**

93. We agree with those observations. Mr Hendy sought to rely on an obiter remark of Underhill LJ at [62] of **Boots** in support of his submission that a failure to accord a right to seek compulsory recognition gives rise to a breach of Art 11:

> **"… if derecognition under Part VI were not available there would in my view be a breach of Article 11."**

94. In our view, that obiter remark is not authority for the proposition that there is a right under Art 11 to seek compulsory recognition. Whilst collective bargaining comprises an essential element of the right to join a union, the availability of voluntary collective bargaining satisfies that right. Based on that analysis, there is, in our view, no constraint on the Appellant's entitlement to conduct collective bargaining, and therefore no interference with Art 11 rights.

Other matters

95. Mr Hendy sought to rely upon the fact that listing confers on the Appellant the right not to have another union seek listing in the same name. Whilst that is undoubtedly correct, it is not clear how this can be said materially to interfere with the right to form and join a trade union or to engage in collective bargaining.

96. Mr Hendy also relied upon the right to protection against the torts of inducing breach of contract, intimidation and conspiracy if a person is acting "*in contemplation or furtherance of a trade dispute*": s.219 of **TULRCA**. We accept that the "*contract*" for these purposes can include contracts with third parties, which might be affected by industrial action, and that therefore, the

absence of a contract between the foster carer and the authority/FCP does not render the protection meaningless. However, such action by foster carers, which even Mr Hendy conceded could be regarded as no more than a "theoretical possibility", given the nature of their obligations, must be considered to be extremely unlikely. In fact, we could not foresee a realistic scenario in which a foster carer who is *in loco parentis* in relation to a vulnerable child would ever "down tools" in contemplation or furtherance of a trade dispute. The consequences of such action for a child could be catastrophic.

97. It was suggested that industrial action short of strike action was more than a theoretical possibility, although no examples of such action were given. It is difficult to envisage any realistic example of such action given the 24-hour nature of the foster caring role. Failure to carry out any aspect of the role, or carrying it out in an incomplete or delayed manner, could put the child at risk. We did not consider such action to be any more likely than strike action. Given these matters, it is apparent that the right under s.219 is extremely unlikely ever to be invoked. The deprivation of that right does not give rise to any material interference with any Art 11 rights.

98. As to the exclusion under s.11 of **TULRCA** of common law rules as to restraint of trade, it was not clear how this exclusion (which was not expressly relied upon by the Appellant) would be likely to assist the Appellant in practice. The likelihood of a local authority, FCP or some other third party taking action against the Appellant on the grounds that a collective agreement to which the Appellant is a party gave rise to some actionable restraint of trade seems to us to be remote in the extreme. This provision has not been shown to confer any real benefit on the Appellant. In our view, the Appellant's inability (as a result of the refusal to list) to take advantage of that provision does not give rise to any material interference with the Art 11 rights.

99. Finally, Mr Hendy relied on various assorted provisions in **TULRCA** imposing rules and requirements in respect of Trade Union elections, discipline, finances, litigation and tax. It was not apparent how any of these restrictions on the trade union's ability to conduct its own affairs as it chooses, could amount to an interference with the right to freedom of association or the right to form and join a union. As Mr Collins submitted, the absence of such restrictions on the Appellant enhances rather than curtails its Art 11 rights.

100. For these reasons, we consider that there is no material interference with the Appellant's Art 11 rights arising out of the refusal to list the Appellant. We go on, however, to consider the question of justification if we are wrong about interference.

Is any interference justified?

101. We do not accept the Appellant's contention that the measure to be justified is the exclusion of foster carers from being able to form and join trade unions of their choice. Foster carers are not, as discussed above, precluded from forming trade associations or from joining or forming trade unions of their choice. The restriction on listing a union whose members are not wholly or mainly worker does not prevent the formation of such a union. The measure that would fall to be justified is the exclusion from the List of Trade Unions whose members are not comprised wholly or mainly of workers.

102. Art 11(2) provides that:

> **"No restrictions shall be placed on the exercise of these rights [under Art 11(1)] 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."**

103. This is an area in which the State enjoys a wide margin of appreciation as has been stated in several cases, some of which have already been considered:

104. In **Unite**, the ECtHR stated that:

> **"60. … the social and political issues involved in achieving a proper balance between the interests of labour and management are of a sensitive nature. The starting point is, therefore, that the United Kingdom enjoys a wide margin of appreciation in determining whether a fair balance has been struck between the protection of the public interest in the abolition of the AWB and the applicants competing rights under article 11 of the Convention."**

105. In **Boots** the Court of Appeal stated:

> **"54. It is self-evident that any right to be recognised conferred by domestic law will have to be defined by rules which identify which unions should be recognised by which employers in respect of which workers and for what purposes. To the extent that the rules of any such scheme constrain access to collective bargaining for a particular union (or its members) the constraints will have to be justified by – to use the language of the Unite decision (see paragraph 66, quoted at paragraph 44 above) – "relevant and sufficient reasons" and should "strike a fair balance between the competing interests at stake". But the decision also makes clear that in assessing any such justification the state should be accorded a wide margin of appreciation."**

106. More recently in the case of **Wandsworth Borough Council v Vining** [2018] ICR 499, the Court of Appeal stated:

> **"64. If, accordingly, the rights in question fall within the scope of article 11 the UK is under a positive obligation to secure the effective enjoyment of those rights. That does not mean that it is under an obligation to ensure that they are available to all employees in all circumstances, but it does mean that where a legislative scheme is in place it must strike a fair balance between the competing interests and any provision of that scheme which restricts its availability to particular classes of workers requires to be justified, albeit that the state is recognised to have a wide margin of appreciation. The relevant principles are discussed at paras. 33-47 and 54-55 in the judgment of Underhill LJ in *Pharmacists' Defence Association Union* v *Boots* [2017] EWCA Civ 66, [2017] IRLR 355, on the basis of *Demir* and the later ECrtHR decision in *Unite the Union v United Kingdom* [2017] IRLR 438."**

107. We were also referred to two further decisions highlighting the particular sensitivities of legislating in this area. The first was **Boddington v Lawton** [1994] ICR 478, in which Sir Donald Nicholls V.-C. at 487E-488A said as follows:

> **"One reason why this would be most undesirable is that, as everyone knows, the role of trade unions and the extent of their rights and liabilities are matters which have long been the subject of keen, sometimes bitter, political debate. The debate still continues, with controversy and discussion at present on the importance and desirability of centralised collective bargaining. Over the decades of this century many changes have been made in trade union legislation, those changes reflecting the views of the government of the day on this sensitive issue. Currently the trade union legislation is mainly embodied in the Act of 1992, as amended by the Trade Union Reform and Employment Rights Act 1993 . That legislation sets out its own balance between the various conflicting interests in this highly contentious area. It cannot be right for the courts, least of all for a judge sitting at first instance, to attempt to re-assess the requirements of public interest in this field, with consequences not only for this one particular association but right across the whole field of trade unionism. I cannot think of a subject where intervention by the judges would be more ill-advised.**
>
> **I hasten to add that, in declining to tread the road Mr. Bragiel mapped out for me, I am not failing to recognise the value properly to be accorded to trade unionism. Indeed, the freedom for a person to form and join a trade union for the protection of his interests is now recognised as, in general, the right of everyone: see article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). All I am doing is to abstain from upsetting the balance of rights and liabilities established by Parliament in this field."**

108. The other is **Gilham v Ministry of Justice** [2018] ICR 827, at [129]:

> **"… this is a context in which the court should tread with care in case it inadvertently (but impermissibly) interferes in an area which is within the province of the democratically elected legislature. As Lord Nicholls of Birkenhead observed in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 9: "all law, civil and criminal, has to draw distinctions." In order to define the scope of application of a particular law this is inevitable. Lines have to be drawn somewhere. In the field of employment law there are many different statutes which confer protection on persons according to different definitions…"**

109. We accept, in the light of these authorities, Mr Collins' submission that if employment and trade union law are areas in which the court should tread with care, that applies *a fortiori* in relation to such law as it applies to foster carers who operate in a field in which difficult choices and highly sensitive decisions must be taken in seeking to achieve the best outcomes for vulnerable children.

110. With that in mind, we turn to consider the justification put forward in this case. Any measure amounting to an interference must first be prescribed by law.

Prescribed by Law

111. We are in no doubt that the measure in this case, namely the requirement that only unions whose members are wholly or mainly workers within the meaning of s.296 of the Act can be listed, is prescribed by law. The measure is one that emerges clearly from the provisions of **TULRCA** as interpreted, in relation to foster carers, by the cases considered under Ground 1 above. That much is conceded by IWGB. Ms Crasnow maintained a submission that, notwithstanding the statutory provisions and the case law, the measure was not prescribed by law because it did not satisfy the requirements of accessibility and foreseeability in that the question of whether each prospective foster carer was a worker or not could only be determined after litigation and determination by a tribunal.

112. We have no hesitation in rejecting that argument. A measure does not need to be completely certain or have been tested by the courts in order to be sufficiently accessible and foreseeable so as to be prescribed by law. The fact that it has been set out in a statutory provision, even if there is some room for argument as to its precise meaning (as is almost invariably likely), will in most cases be sufficient to satisfy the requirement that it be prescribed by law. If that were not the case then any statutory provision which had not been subject of an authoritative court interpretation would be one that was not prescribed by law. We were not taken to any authority in support of such a far-reaching proposition.

Necessary in a democratic society

113. As to whether the measure is necessary in a democratic society, this involves considering whether the measure seeks to achieve a legitimate aim and whether the means chosen to achieve that aim are proportionate.

Does the measure seek to achieve a legitimate aim?

114. Two specific aims are identified by the Respondents:

a. the first is the aim of maintaining the distinction adopted by the legislation between those who are workers (i.e those who work under a contract) and those who are not;

b. the second is the aim of protecting the rights and wellbeing of children in foster care.

115. As to the first of these aims, we consider that to be a perfectly legitimate one to pursue. There is, as already stated, a broad margin of appreciation afforded to member states in this field and in achieving a proper balance between the respective interests of labour and management. Member states are entitled to draw distinctions between different groups in relation to trade union rights for "*the protection of the economic and social order*": see **Manole (Romanian Farmers Direct) v Romania** (46551/06), 16 September 2015 at [65] (See also the extracts from the **Unite** and **Boots** decisions above). Parliament has decreed that the benefits of listing (including, in particular, the right to seek, having obtained a certificate of independence, recognition for collective bargaining purposes) should be confined to those unions whose members are wholly or mainly workers. As stated in **Boots**, Art 11 does not confer "*a universal right on any trade union to be recognised in all circumstances*" and that "*any right to be recognised conferred by domestic law will have to be defined by rules which identify which unions should be recognised by which employers in respect of which workers and for what purposes*": see **Boots** at [54]. The defining characteristic of a worker, for these purposes, is that he or she operates under a contract.

A The nature of that contract (ie. whether it is a contract of service, or for services or one under which there is an obligation to do work personally) is an important one in domestic employment law in that the extent and nature of any employment rights enjoyed by an individual will depend on which type of contract one works under. In our judgment, there is nothing irrational in stipulating that the absence of any contract at all creates a further category which itself defines or limits the rights available as far as trade unions are concerned. The creation of such a category falls well within the broad margin of appreciation afforded to the State in determining which unions should be entitled to seek compulsory recognition.

116. The compulsory collective bargaining provisions in Sch A1 to **TULRCA** focus on pay, hours and holidays. These are matters that are normally the subject of contractual obligation. There is therefore a rational connection between the aim in question, namely maintaining a distinction between those working under a contract and those who are not, and the restriction on compulsory collective bargaining to listed unions.

117. Of course, the particular group without a contract and affected by this restriction here is foster carers. The relationship between foster carers and the local authority is governed by statutory responsibilities imposed in order to safeguard and promote the welfare of children; it is not (according to current law) governed by a contract negotiated between them and which may be the subject of collective bargaining. In those circumstances, it seems to us to be perfectly legitimate and rational not to extend the right of compulsory collective bargaining to that group.

118. As for the second aim, which is to protect the rights and well-being of children in foster care, that too is a perfectly legitimate aim. Indeed, it is not seriously contended otherwise by the Appellant or the IWGB. However, Mr Hendy submits that there is no rational connection between that objective and the exclusion of foster carers from benefits conferred by listing. Reliance was

placed on the case of **Matelly v France** (Application no. 10609/10), 2 October 2014, which dealt with a ban on military personnel from joining a trade union. Even putting aside the fact that (despite having over 200 authorities before us) no translation of the original French judgment was available, we were not assisted by that case. That is for the simple reason that the present case had nothing to do with a ban on joining a trade union.

119. The remedy that the Appellant seeks is that s.296 of **TULRCA** should be read down so that "worker" includes any person in an employment relationship whether or not under a contract. The difficulty with the Appellant's position, submits Mr Collins, is that by making the foster carer a worker, one risks turning the home environment, in which the parental relationship between foster carer and looked after child is developed, into a workplace. He relies upon evidence, which suggests that this could be detrimental to the interests of the child. As set out in his skeleton argument:

> **"109. The effects of a finding that foster carers are workers would be significant. The question of practicality and cost is considered in the paragraphs of Ms Burlington's statement identified above (including, for example, the difficulty of providing for daily breaks). But as or more important are the unquantifiable effects on children. To quote some examples from Ms Willison's statement:**
>
> ***"the idea that someone is paid to be interested in them, to show them love and affection, can never sit easily."***
>
> ***"Even the perception that foster carers might be able to undertake industrial action, or strike in order to achieve higher pay, could seriously undermine the stability and trust so needed in these relationships."***
>
> ***"No child or young person wants to be told that they are moving out of their home for a fortnight whilst their foster parent takes their annual leave entitlement."***
>
> ***"Describing what would constitute employment status for foster carers to young people and their carers is met with confusion and, in many cases, dismay".***

120. Mr Hendy submits that the denial of listing has nothing to do with the rights of children. He points to the fact that foster carers are, as the Respondents accept, able to join unions with listed status so long as the number of foster carers within that union does not reach a majority. If such membership of other unions is tolerated then there can be no legitimate basis for saying that

A the refusal to list the Appellant pursues the aim of protecting children's rights. The difficulty with Mr Hendy's argument is that it confuses the right to join a union, which the Respondents are not seeking to prevent, and the refusal to list. The remedy in respect of the latter does involve a reading of the relevant provision which would mean that foster carers are to be treated as workers. That would have the adverse consequences, at least as far as the perception of looked after children is concerned, set out above.

C 121. We note that Mr Hendy submits that any reading down would only apply for the purposes of listing, and would not confer on foster carers all of the other rights available to workers under **TULRCA** and other legislation. That is probably right, but it seems to us that the arguments made by Mr Collins as to the perception of looked after children would still hold good. In reaching these views, we do not ignore the submissions of ECRU as to the benefits for looked after children of foster carers achieving worker status and/or having extended trade union rights. These submissions appear to contradict, to some extent, the evidence adduced by the SSE and LGA as to the detriment to looked after children of foster carers being perceived as having worker status. It is not possible for the EAT to reach any conclusive view as to the merits or otherwise of the parties' respective positions on that particular issue. However, it can be said that the material adduced by the SSE and LGA in this regard is certainly weighty and appears to give paramountcy to the best interests of the child. ECRU submits that there is no evidence that a "*full best interests*" assessment has been carried out and that the evidence relied upon is "*selective*". That attack focuses mainly on the evidence of the witnesses, Ms Willison and Ms Burlington. However, the evidence in support of the SSE's and LGA's position goes far wider and includes comprehensive reports on foster care produced by, amongst others, Sir Martin Narey. Sir Martin considered the question of employment rights in relation to foster carers concluding as follows:

> **"Some carers are critically aware that employment rights would fundamentally change fostering… We acknowledge that employment rights would, indisputably, bring some benefits to foster carers, not least in basic things such as sickness benefits and protection against dismissal, neither of which is provided**

> **for under current arrangements. But they would also bring significant obligations, more oversight and impinge drastically on the independence of foster carers, turning their homes into places of work. And the current helpful tax and benefit arrangements would be most unlikely to be extended to employed carers."**

122. Furthermore, having regard to the wide margin of appreciation to be afforded to the state, such material as to the consequences of disturbing the current restrictions on the Appellant achieving listed status, cannot be disregarded.

Is it proportionate?

123. The approach to be taken in determining whether an impugned measure is justified is well-established, the four steps being set out in the case of **Bank Mellat v HM Treasury [No. 2]** [2013] UKSC 38; [2014] AC 700. These are whether:

a. the objective of the measure is sufficiently important to justify the limitation of a protected right;
b. the measure is rationally connected to objective;
c. a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and
d. balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

124. The first two have already been considered above. It is our view that the measure in question is rationally connected to sufficiently important objectives. As to the third and fourth matters, i.e. whether, striking a fair balance, less intrusive measures could not have been used

without unacceptably compromising the achievement of the objective, the position, as we see it, is as follows:

125. The measure in question imposes a relatively limited restriction on the Appellant and/or its members. Foster carers are able to:

a. form a legal entity of their choice to represent their interests;

b. form their own trade unions;

c. join other trade unions with or without listed status (although in the former, they could not form a majority of the union);

d. engage in voluntary collective bargaining and reach collective agreements;

e. enjoy many of the benefits associated with listing (not including compulsory collective bargaining) even without listed status; and

f. pursue all of their stated aims as set out in their evidence without listed status.

126. It is apparent that the intrusion on the Art 11 rights to form and join a trade union and to engage in collective bargaining is fairly minimal. We do not consider that any lesser measure could have been used to achieve the stated aims. No lesser measure has been suggested by the Appellant or the IWGB in submissions. A measure permitting the listing of any trade union irrespective of whether its members were workers would erode the distinction that Parliament has sought to draw between those with contracts and those without. The definition of worker is used in a wide variety of employment legislation: see the summary in **Gilham** at [129] and [130]. As stated there:

> **"130. It can therefore be seen that the definition of "worker" which is in issue in the present case is far from unusual. It is also clear that Parliament has used a number of different formulae in order to define the scope of protection of different pieces of employment legislation. It may well be that the line which it has drawn is open to criticism from those who are dissatisfied with the lack of apparent protection for them. For example, they may qualify as "workers" but may be excluded from the definition of "employees" for the purpose of the law of unfair dismissal. Nevertheless, that is the policy choice which the democratically elected Parliament of the United Kingdom has made."**

127. Against that minimal intrusion is the importance of maintaining the distinction (as far as Trade Union rights are concerned) between Unions with workers (in the majority) and those without; and of protecting the interests of looked after children. In our judgment, these objectives clearly outweigh the minimal intrusion involved. In drawing a distinction between those who worked under a contract and those who did not for the purposes of accessing trade union listing and the rights that flow from that, Parliament has achieved a fair balance between the competing interests of workers and management. Accordingly, we find that the interference (if there is any) would be justified and there is no violation of the Appellant's Art 11 rights.

Article 14

Submissions

128. Article 14 is not a freestanding prohibition on discriminatory treatment since it only applies in the context of securing another Convention right or freedom. Ms Crasnow notes that the threshold for a breach of Art 14 is lower than in respect of one of the substantive rights, and, in particular, notes that it is unnecessary for there to have been a breach of Art 11 in order for Art 14 to be engaged. Ms Crasnow relies upon the "*other status*" aspect of Art 14. In that regard, she submits that, given the generous interpretation to be given to the term "*other status*": **R(Stott) v Secretary of State for Justice** [2018] 3 WLR 1831 at [81], it is sufficient in this case that the foster carers worked other than under a contract of employment or contract for services. It is submitted that that is supported by decisions in **Engel v Netherlands** (1979-80) 1 EHRR 706 and **Sidabras v Lithuania** (2006) 42 EHRR 6, in which the status of having a particular military rank and being a former KGB officer respectively were considered sufficient. These were both examples of 'personal characteristics' that were freely chosen by the applicant rather than being a status which was inherent or innate in nature. Numerous examples were given of statuses recognised in both domestic and Strasbourg authority. These included, for example, immigration

A status (**R (Tigere) v BIS** [2015] 1 WLR 3820), marital status (**R (Catherine Harvey v London Borough of Haringey** [2018] EWHC 2871 (Admin), [2019] Pens LR 3); and ordinary residence (**Carson v UK** (2008) 48 EHRR 41).

B 129. If the absence of a contract is regarded as 'other status' for the purposes of Art 14, Ms Crasnow submits there is clearly less favourable treatment as compared to those in analogous situations having contracts. Finally, it is submitted that that difference in treatment is not justified

C in that there is no legitimate aim in play that justifies treating foster carers without contracts differently from foster carers who do have contracts or other care workers with contracts such as carers in residential care homes.

D 130. Mr Moretto, who led the argument for the SSE in relation to Art 14, submitted that the EAT is clearly bound by the decision of the Court of Appeal in **Gilham**. He submits that that case, and the decision of the Supreme Court in **Stott,** make it quite clear that there is still a need

E to identify a "*personal characteristic*" by which persons or groups of persons are distinguishable from each other: **Kjeldsen, Busk Madsen and Pedersen, v Denmark** (1976) EHRR 711 at [56]. In any case, submits Mr Moretto, foster carers are not in an analogous position to those who work

F under a contract given the extent to which their work is regulated by statutory provisions and the aim of a foster carer to provide a home environment for a looked after child. Even if that is wrong, he submits that in this context it would need to be shown that the justification of the government was "*manifestly without reasonable foundation*", and that that cannot be shown in this case,

G particularly given the decisions in **Gilham** and **Stott**.

Discussion

H 131. Article 14 prohibits discrimination, providing:

> **"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour,**

> **language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"**

132. There are four elements that need to be established in order to make good an Art 14 claim. These were set out by Lady Black in the judgment of the Supreme Court in **R (Stott) v Justice Secretary** [2018] 3 WLR 1831 at [8]:

> **"In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. …"**

133. Lady Black then reviewed the authorities relating to "*other status*" prior to 2010 and summarised the applicable principles as follows:

> **"56. Reviewing these decisions, together with *R (Clift) v Secretary of State for the Home Department [2007] 1 AC 484* , I think it can be said (although acknowledging the danger of over-simplification) that prior to the decision in *Clift v United Kingdom CE:ECHR:2010:0713JUD000720507; The Times, 21 July 2010* , the House of Lords had adopted the following position on "other status".**
>
> **(i) The possible grounds for discrimination under article 14 were not unlimited but a generous meaning ought to be given to "other status".**
>
> **(ii) The *Kjeldsen* test of looking for a "personal characteristic" by which persons or groups of persons were distinguishable from each other was to be applied.**
>
> **(iii) Personal characteristics need not be innate, and the fact that a characteristic was a matter of personal choice did not rule it out as a possible "other status".**
>
> **(iv) There was support for the view that the personal characteristic could not be defined by the differential treatment of which the person complained.**
>
> **(v) There was a hint of a requirement that to qualify the characteristic needed to be "analogous" to those listed in article 14 , but it was not consistent (see, for example, Lord Neuberger's comment in *R (RJM) v Secretary of State for Work and Pensions [2009] AC 311* , para 43) and it was not really borne out by the substance of the decisions.**
>
> **(vi) There was some support for the idea that if the real reason for differential treatment was what someone had done, rather than who or what he was, that would not be a personal characteristic, but it was not universal.**
>
> **(vii) The more personal the characteristic in question, the more closely connected with the individual's personality, the more difficult it would be to justify discrimination, with justification becoming increasingly less difficult as the characteristic became more peripheral."**

134. The position post-**Clift**, was summarised by reference to the above principles as follows:

> **"63. Returning to the list of propositions derived from the House of Lords' decisions which is to be found at para 56 above, it seems to me that the subsequent authorities in the Supreme Court could be said to have continued to proceed upon the basis of propositions (i) to (iii), which have also continued to be reflected in the jurisprudence of the ECtHR. Proposition (iv) lives on, in *R v Docherty [2017] 1 WLR 181* , but perhaps needs to be considered further, in the light of its rejection in *Clift v United Kingdom* : see further, below. The "analogous" point, which features at proposition (v), is reminiscent of the ejiusdem generis argument advanced in *Clift v United Kingdom CE:ECHR:2010:0713JUD000720507; The Times, 21 July 2010* , but not addressed head-on by the ECtHR. That court's answer to the argument was, it will be recalled, to give quite wide ranging examples of situations in which a violation of article 14 had been found. With the continued expansion of the range of cases in which "other status" has been found, in domestic and Strasbourg decisions, the search for analogy with the grounds expressly set out in article 14 might be thought to be becoming both more difficult and less profitable. However, that should not, of course, undermine the assistance that can be gained from reference to the listed grounds, taken with examples of "other status" derived from the case law. It may not be helpful to pursue proposition (vi) abstract; whether it assists will depend upon the facts of a particular case. Proposition (vii) comes into play when considering whether differential treatment is justified, rather than in considering the "other status" question, and need not be further considered at this stage."**

135. Applying those principles in that case, Lady Black concluded that the difference in treatment of prisoners serving extended determinate sentences did amount to treatment on the ground of "*other status*": see [80] and [81].

136. Applying those principles to the present case, our view is that the status of not having or working under a contract does not qualify as "*other status*" within the meaning of Art 14. The status of having a contract is not remotely analogous to the characteristics expressly listed under Art 14. Whilst it is not a clear or consistent requirement of the caselaw that the status in question be analogous to such characteristics, there remains a "hint" that there is such a requirement, and one cannot disregard the assistance to be gained by reference to the listed grounds: **Stott** at [63]. Furthermore, whilst a foster carer will have little choice but to accept the non-contractual status conferred on them by their role, that is not determinative.

137. That would be our conclusion even if the matter were entirely free from directly relevant authority. However, there is clear Court of Appeal authority which deals with the issue head-on and which supports the conclusion reached by applying the relevant principles summarised in **Stott.**

138. In **Gilham v Ministry of Justice** [2018] ICR 827, in which the issue was whether a judicial office holder was a 'worker' within the meaning of s.230(3) of the **Employment Rights Act 1996** ("**ERA**"), the Court of Appeal held as follows:

> **"119. Mr Stilitz submits that the position of those working other than under a contract within the meaning of section 230(3) of ERA should be recognised as a relevant "other status" for the purposes of article 14 . Alternatively he submits that the relevant status is either that of a person "holding judicial office" or the larger class of "office-holder". We do not accept those submissions.**
>
> **120. First, it seems to us that the legislation in question does not draw a distinction based on belonging to a class of judicial office-holders or indeed office-holders as such. It is important to keep in mind that Parliament has not discriminated against either the class of office-holders generally, or the sub-class within that class of judges, as such. What it has done in defining "worker" in section 230(3) is to draw the line in such a way that the effect is that all persons who do not have a relevant contract within the meaning of that definition (which includes judges) fall outside the scope of protection.**
>
> **121. Secondly, the distinction which is in truth used by Parliament in defining the scope of protection in section 230(3) of ERA is all to do with having a relevant contract and nothing to do with "personal" characteristics.**
>
> **122. Therefore we have come to the conclusion that there is no difference of treatment on the ground of any "other status" within the meaning of article 14."**

139. It was made clear in **Stott** that "the Kjeslsden test of looking for a "personal characteristic" by which persons or groups of persons were distinguishable from each other was to be applied": see [56(ii)]. Furthermore, the definition of worker under s.230(3) of ERA is similar to that under s.296(1) of **TULRCA**. As such, the clear conclusion of the Court of Appeal in **Gilham** that the distinction based on contract had "nothing to do with "personal" characteristics", is one that applies equally to s.296(1) of **TULRCA**, and is binding on the EAT. We see no real room for argument about that. The decision in **Gilham** is not distinguishable given the similarity of the legal provision being considered. We do not consider the decision to be contrary to the

weight of other domestic and Strasbourg authority as submitted by Ms Crasnow. As stated above, even in the absence of **Gilham**, our view would have been the same. The fact that **Gilham** is being appealed to the Supreme Court does not diminish its binding nature at all; unless and until it is overruled, the position in law is that a distinction based on contract within the meaning of s.230(3) of ERA (and therefore s.296(1) of **TULRCA**) does not qualify as "*other status*".

140. That conclusion is sufficient to dispose of the argument under Art 14. However, even if we are wrong about that, we would dismiss the claim on the basis that foster carers are not in an analogous situation to other care workers with whom the Appellant seeks to draw a comparison. We accept Mr Moretto's submission that the detailed regulatory regime governing every key aspect of a foster carer's work, and the particular family environment which a foster carer is required to provide for a looked after child, mean that the position of foster carers differs significantly from that of other care workers, who work fixed hours and are not required by statute to treat the cared for person as a member of their own family. (In making this last point, we do not seek to diminish in any way the immense value of the care provided by care workers (which in some cases might well exceed what the cared for person can realistically expect from a family member); but merely seek to highlight the different nature of the obligations on the two groups).

141. Finally, we consider that if there were any qualifying differential treatment, this would be entirely justified. In this area, the State has a wide margin of appreciation as confirmed in **Gilham**:

> **"110. In *Stec v United Kingdom* (2006) 43 EHRR 47, at para. 51, the Grand Chamber of the ECHR noted that Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. It said, at para. 52:**
>
> **"The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in**

> **principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."**
>
> **…**
>
> **127. It is important to keep in mind that the same definition of "worker" which we have to consider is used in a variety of contexts in employment legislation. That definition is used to determine the scope of many different pieces of legislation, not only the one that is directly in issue before the Court in the present case. This is a field, in other words, which concerns social and economic regulation and the arguments made by Mr Stilitz, if accepted, may well have repercussions for other legislation."**

142. The question is whether the way in which Parliament has seen fit to limit the right of persons working other than under a contract in the exercise of their Art 11 rights in comparison with "workers" is one that was reasonably open to it: see **Gilham** at [132]. We consider that it was. As in the **Gilham** case in respect of s.230 of ERA, the policy choice made by Parliament in drawing the distinction that it has between the two groups has a rational basis (as discussed above) and cannot be said to be "*manifestly without reasonable foundation*".

143. For these reasons, Ground 2 of the Appeal is dismissed.

Ground 3 – Reading Down

144. This Ground only arises in the event that was that there was a violation of Art 11 rights. As we have found that there was no violation, we can deal with this ground relatively briefly.

145. If there had been a violation, we would have been required by s.3 of the **Human Rights Act 1998** ("**HRA**") to read and give effect to the legislative provision in question so far as possible in a way that is compatible with Convention rights. Ms Crasnow's submission is that s.296 of **TULRCA** should be amended as follows:

> **"(1) In this Act "worker" means an individual who works, or normally works or seeks to work –**
>
> **under a contract of employment, or**

> **under any other contract or employment relationship whereby he undertakes to do or perform personally any work or services for another party ~~to the contract~~ who is not a professional client of his; …"**

146. In our view, an alternative formulation, which would do less violence to the existing wording in that it would avoid any deletions, but which would achieve the same effect, is as follows:

> **"…under any other contract or employment relationship whereby he undertakes to do or perform personally any work or services for another party to the contract or employment relationship who is not a professional client of his; …"**

147. We consider that an amendment to that effect, which extends the scope of s.296 to those in an employment relationship, would be a possible means of complying with the interpretative obligation under s.3 of **HRA**. As discussed above under Ground 2, the broader formulation of "employment relationship" would be apt to include even those without a contract. The Court of Appeal in **Gilham** envisaged a similar possibility albeit it did not identify any particular form of words:

> **"90. If we are right as regards issue (1), it is unnecessary to reach a view about issue (2). We are inclined to think, however, that having regard to the strength of the interpretative obligation under section 3 of HRA it would be possible to read section 230(3) of ERA down so that it extended to an "employment relationship" of the kind found to exist in *O'Brien*. It does not seem that the definition of a worker by reference to the existence of a contract, so as to exclude a "mere" office-holder, is a fundamental feature of the legislation."**

148. We find it difficult to agree, however, with the obiter remark of the Court of Appeal there that the existence of a contract is not a fundamental feature of the legislation. The remark is not explained and does not sit easily with the Court of Appeal's analysis at [129] and [130] as to the policy choices made by Parliament in setting out definitions for "worker" under different pieces of legislation, all of which (despite some differences and exceptions) are consistent in requiring that work be done under a contract. It seems to us that the demarcation adopted by Parliament between those working under contracts and those who do not, *is* a fundamental feature of the legislation and the legislative scheme more generally. Accordingly, we cannot accept Ms

Crasnow's contention that her proposed reading of s.296 would not go against the "grain" of the legislation: see **Ghaidan v Godin-Mendoza** [2004] 2 AC 557 at [33]. In our view, to interpret the legislation so as to include non-contractual relationships within its scope would go 'against the grain'.

149. For these reasons, even if (contrary to our conclusions set out above) there had been a violation of the rights under Art 11, we do not consider that it would be possible to read s.296 of **TULRCA** down to give effect to such rights.

Conclusion

150. For the reasons set out above, this appeal fails and is dismissed.