

Foster carers: worker status under Art 11 ECHR

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Introduction

1. The Court of Appeal recently handed down the decision in *National Union of Professional Foster Carers v The Certification Officer* [2021] EWCA Civ 548. It is the latest in a number of decisions to look at the unique position of foster carers, this time considering the ability to form trade unions, under Article 11 European Convention on Human Rights and Fundamental Freedoms ('ECHR') (the right to freedom of association).
2. An application was made to the Certification Officer on 18 January 2017 for an association intending to represent foster carers to be entered on the list of trade unions maintained by under Chapter I of Part 1 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA 1992'). At the time it had six officers, but evidence was given that 500 foster carers had expressed an interest in joining. It came to be named the National Union of Professional Foster Carers ('NUPFC'). On 10 July 2017, the Certification Officer rejected the NUPFC's application on the basis that foster carers are not workers. The NUPFC appealed unsuccessfully to the EAT. They then appealed to the Court of Appeal.

Issues

3. The initial legal issues considered by the EAT were:
 - (a) Whether the NUPFC was entitled to be recognised as a trade union, that being an organisation 'which consists wholly or mainly of workers' as defined by s1 Trade Union and Labour Relations (Consolidation) Act 1992 (which includes a requirement that a worker be working under a contract);
 - (b) If not, whether this gives rise to a breach of Article 11 ECHR.
4. The NUPFC accepted that the Court of Appeal were bound by the authorities that state that foster carers are not workers as they do not work under a contract (see *W v Essex County Council* [1999] Fam 90 and *Rowlands v City of Bradford Metropolitan District*

Council [1999] EWCA Civ 1116). As such, it only pursued the second of these points in the Court of Appeal. Nevertheless, it made clear that it reserves the right to argue in any appeal to the Supreme Court that foster carers work under a contract.

Court of Appeal decision

5. The decision of the Court of Appeal, therefore, focused on whether Article 11 ECHR was engaged, whether there was interference with that right, and whether any interference was justified as a proportionate means of achieving a legitimate aim [72-73]. The leading judgment was given by Underhill LJ.
6. On engagement, the starting point was the decision of the Grand Chamber of the European Court of Human Rights ("the ECtHR") in *Sindicatul "Păstorul Cel Bun" v Romania* app. no. 330/09, ("the Good Shepherd case") in which it was held that Article 11 was engaged for a group of Orthodox priests who had formed a trade union. The Grand Chamber held that Article 11 will be engaged, as regards trade union rights, where workers are parties to 'an employment relationship'. In establishing an 'employment relationship' for these purposes, it followed the International Labour Organisation Recommendation (ILO R198). Among other things, this includes that the existence of an employment relationship should not turn on how the relationship is characterised by the parties but on an assessment of the objective facts. As such, it does not expressly exclude relationships that are not contractual. Furthermore, while the 'performance of work' and 'remuneration of the worker' were of significant importance, they were only indicators, and not determinative, of the existence of an employment relationship [75-82].
7. On this basis, the Court held that the Article 11 was engaged. In doing so, he noted the Certification Officer's submission that the essential character of foster care is familial and caring, not occupational, and that even though most are paid, it is not a relationship of a 'wage/work bargain'. However, he held that this did not prevent there being an employment relationship in the Article 11 context, in particular highlighting that foster carers provide a service to the foster service which engages them and noting that the *Good Shepherd* case extends the concept of an employment relationship to non-standard occupations. Furthermore, he was also willing to accept that 'allowance-only' foster carers (i.e. those that receive money to support a child but not specifically a reward for their services) were also in an employment relationship despite the fact that they did not receive remuneration [89-98].

8. It was then necessary to decide if there had been interference with Article 11 by the decision of the Certification Officer not to register the NUPFC. The Court accepted that there was general interference by the denial of an official status as a union (which, while not strictly necessary for the rights and protections under TULRCA 1992, was recognised as important) and that it was deprived of the right to invoke the compulsory recognition procedure under Schedule A1 of TULRCA 1992 [99-115].
9. On justification, it was held that any interference was not 'minimal' and was not a proportionate means of achieving the legitimate aims put forward: (i) "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" and (ii) "protecting the rights and wellbeing of children in foster care" [116-141].
10. As such, Underhill LJ concluded that there was a breach of Article 11 and made a declaration that for the purpose of section 1 TULRCA 1992, as applied in sections 2-4, the definition of "worker" in section 296 (1) extends to persons who are parties to a foster care agreement with a fostering service provider within the meaning of regulation 27 (5) of the Fostering Service (England) Regulations 2011 [147].
11. The other justices, Bean LJ and Green LJ, concurred with Underhill LJ's leading judgment. Bean LJ noted that the complexity of the issues derived primarily from the decision in *W v Essex County Council* which held that there is not contract where *'there is a statutory obligation to enter into a form of agreement the terms of which are laid down'*. He highlighted his puzzlement at the decision, noting that there are other types of work where terms and conditions determined by statute and respectfully suggested that it *'may require reconsideration, either by the Supreme Court or by Parliament'* [153-155].

Comment

12. While this decision relates to a specific issue, the unique position of foster carers has attracted much litigation in a variety of contexts. As highlighted by Bean LJ, much of this has arisen from the, as he put it, *'puzzling'* decision in *W v Essex* that foster carers do not work under a contract. If this were to change, this could have significant implications. In this regard, Underhill LJ concluded his judgment by suggesting *"The Government may wish at least to consider whether it would make sense for it to consider seeking now to introduce bespoke legislative provision for the position of foster carers, which would either preserve the present exclusion or provide for rights appropriate to their very unusual role"*.

It remains to be seen if the Government takes up this suggestion (and whether this would clarify matters or simply cause more litigation in this area).

13. Finally, the reliance on the ECHR should be noted. Now that the UK has left the EU (the historic basis for a large part of our employment law), it will be interesting to see how the ECHR is used to support and advance workers' rights.

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