Neutral Citation Number: [2021] EWCA Civ 548

Case No: A2/2019/2314

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
The Hon Mr Justice Choudhury (President), Mrs M V McArthur & Ms P Tatlow

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BEAN
and
LORD JUSTICE GREEN

- -

Between :

NATIONAL UNION OF PROFESSIONAL FOSTER CARERS	**Appellant**
- and -	
THE CERTIFICATION OFFICER	**Respondent**
(1) INDEPENDENT WORKERS UNION OF GREAT BRITAIN	
(2) SECRETARY OF STATE FOR EDUCATION	
(3) EUROPEAN CHILDREN'S RIGHTS UNIT	**Interveners**

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Ms Rachel Crasnow QC, Mr David Stephenson and **Ms Rachel Barrett** (instructed by **TMP Solicitors LLP**) for **the Appellant**
Mr Ben Cooper QC and **Ms Jane Russell** (instructed by **the Treasury Solicitor**) for **the Respondent**
Lord Hendy QC, Ms Katharine Newton QC and **Ms Madeline Stanley** (instructed by **Harrison Grant Law**) for **the First Intervener**
Mr Ben Collins QC and **Mr Robert Moretto** (instructed by **the Treasury Solicitor**) for **the Second Intervener**
Mr Jamie Burton QC (instructed by **Liverpool Law Clinic**) for **the Third Intervener**

Hearing dates: 1st, 2nd and 3rd December 2020

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. In broad terms, this appeal is about the rights of foster carers to form a trade union, although in fact the legal issues are rather more subtle. The role of foster carers is a very important one in our society because placement in foster care is the main way in which local authorities discharge their statutory responsibilities to provide accommodation and maintenance for "looked after" children. At least two established trade unions have foster carers as members, the GMB and the Independent Workers Union of Great Britain ("the IWGB"), but there is no trade union exclusively for them.

2. On 18 January 2017 an association intending to represent foster carers applied to the Certification Officer to be entered on the list of trade unions maintained by him[1] under Chapter I of Part 1 of the Trade Union and Labour Relations (Consolidation) Act 1992. The application form named six officers, including a Mr Robin Findlay as Chairman and a Mr Dean Da Silva as Secretary. Its name at that stage was the Foster Carers Workers Union, but it was shortly afterwards re-named the National Union of Professional Foster Carers ("the NUPFC"). Although the then membership of the NUPFC was apparently limited to the six officers[2], it hoped to attract a substantial membership once it was listed: Mr Findlay told the Certification Officer that over 500 foster carers had already expressed an interest in joining. I do not know whether it is normal practice for a trade union to apply for listing at so early a stage in its life; and the fact that the NUPFC had so few members at the time of its application has in at least one respect complicated the analysis in these proceedings (see para. 96 below). But Mr Findlay's evidence was that the founders did not believe that it was sensible to start recruitment, as opposed to obtaining expressions of support, until the NUPFC had a formal status.

3. By a decision dated 10 July 2017 the Certification Officer rejected the NUPFC's application. His reasons can be summarised as follows:

   (a) Section 1 of the 1992 Act defines a trade union (so far as relevant for present purposes) as an organisation which consists wholly or mainly of "workers".

   (b) The definition of "worker" in section 296 of the Act requires that the worker be working under a contract.

   (c) In a line of cases beginning with the decision of this Court in *W v Essex County Council* [1999] Fam 90 it had been held that the "Foster Carers Agreement" ("the FCA"), which governs the relationship between foster carers and the local

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1 The Certification Officer at that time was Mr Gerard Walker. It is now Mrs Sarah Bedwell. Since the impugned decision was taken by Mr Walker I will for convenience, and without intending any disrespect to Mrs Bedwell, use "he" and "him" in this judgment.

2 In an amended witness statement dated 24 January 2019 Mr Findlay says that as at that date the NUPFC "[has] 3 members on our books". It is not clear if this means that some of the existing members had left or that it had three members in addition to the six named on the application form; but we are concerned with the position as it was at the time of the Certification Officer's decision.

authorities or fostering agencies which engage them, does not constitute a contract.

(d) Accordingly, since the current and intended membership of the NUPFC would wholly or mainly be working under FCAs, it did not qualify as a trade union for the purpose of the Act.

I set out the statutory provisions in full, and give more detail about the *W* line of cases, below.

4. The NUPFC appealed to the Employment Appeal Tribunal ("the EAT"). It contended that the *W* line of cases did not constitute binding authority as to the meaning of "trade union" for the purpose of the right to be listed under Part I of the Act. But it also argued that, if that was wrong, the inability of foster carers to form listed trade unions would give rise to a breach of article 11, alternatively article 14, of the European Convention on Human Rights; and that it was possible for the EAT, applying the special rule of construction under section 3 of the Human Rights Act 1998, to interpret the relevant provisions so as to avoid that breach. (It did not seek a declaration of incompatibility under section 4 of the Act because the EAT has no power to make such a declaration.)

5. Those arguments involved important issues of law, and the EAT allowed interventions by the IWGB, the Secretary of State for Education (who has responsibility for the statutory system of child protection), the Local Government Association ("the LGA"), and the European Children's Rights Unit at Liverpool University's School of Law ("ECRU").

6. By a judgment handed down on 23 July 2019 the EAT (Choudhury P, Mrs Margot McArthur and Ms Pam Tatlow) dismissed the appeal. In summary, it decided:

(1) that the Certification Officer had been correct to decide, following the *W* line of cases, that foster carers did not work under a contract, and accordingly that the NUPFC was not entitled to be listed as a trade union under section 2 of the 1992 Act; and

(2) that that state of affairs did not give rise to a breach of the Convention rights of the NUPFC or its members.

7. This is an appeal against that decision. Formally, the NUPFC challenges both elements. However, it now accepts that *W v Essex County Council* remains authoritative, that it applies in the circumstances of the present case and that since it is a decision of this Court we are bound by it. Accordingly, no argument was advanced on the first element, although the NUPFC has made it clear that it reserves the right to argue in any appeal to the Supreme Court that foster carers work under a contract. The issues before us are thus concerned entirely with the claim of breach of Convention rights. Before us the IWGB, the Secretary of State for Education and ECRU have again intervened, though the LGA has not.

8. I should say something about the basis on which the IWGB has an interest in the appeal. Although it has a number of foster carer members, it is not directly affected by the issue of the right to be listed under section 2 of the 1992 Act because most of

its members work in other fields and are workers falling within the terms of the statutory definition. In theory there could be a problem if the proportion were to change so that it comprised mainly foster carers, but that is not anticipated. The IWGB's real interest seems to be that it believes that the decision on the issue of the right to be listed may have wider implications for the rights of foster carers: whether that is the case is addressed elsewhere in this judgment.

9. The NUPFC has been represented by Ms Rachel Crasnow QC, Mr David Stephenson and Ms Rachel Barrett; the Certification Officer by Mr Ben Cooper QC and Ms Jane Russell; the IWGB by Lord Hendy QC, Ms Katharine Newton QC and Ms Madeline Stanley; the Secretary of State by Mr Ben Collins QC and Mr Robert Moretto; and ECRU by Mr Jamie Burton QC. The representation was the same in the EAT, except that the Certification Officer's leading counsel was Mr Thomas Linden QC.

10. On the principal issues in the appeal the cases of the NUPFC and the IWGB largely overlapped; and the same is true of the cases of the Certification Officer and the Secretary of State. Where it is unnecessary to distinguish I will, for convenience and despite the fact that it is strictly inaccurate, refer to them as "the Appellants" and "the Respondents".

11. The relevant provisions of the 1992 Act apply to Great Britain, and accordingly the role of the Certification Officer under Part 1 applies in Scotland and in Wales as much as in England. However, child protection is a devolved matter in both countries. We were not referred to the Scottish and Welsh legislation about foster carers, and most of the evidence also related only to England. That is not ideal, particularly as there may be material differences in the position of foster carers in Scotland and England (see para. 55 below). However, the original members of the NUPFC are all from England, and even if it grows in the future the likelihood is that members living in England will continue to be the majority; and since the issues in this case depend on the character of its membership overall the focus on England should not be a problem.

THE BACKGROUND LAW

THE RELEVANT PROVISIONS OF THE 1992 ACT

12. Part 1 of the Act is headed "Trade Unions". Chapter I, which comprises sections 1-9, is headed "Introductory".

13. Section 1 is titled "Meaning of 'trade union'" and reads (so far as relevant):

> "In this Act a 'trade union' means an organisation (whether temporary or permanent) –
>
> (a) which consists wholly or mainly of workers 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) … ."

The term "worker" is defined in section 296 (1) of the Act as follows (so far as relevant):

> "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) … ."

It follows from section 1 and section 296 (1) read together that a trade union must consist wholly or mainly of individuals who work under a contract (whether a contract of employment or a "limb (b) contract"). As already noted, it was this point which was central to the decision of the Certification Officer.

14. Sections 2-4 are headed "The list of trade unions". They read:

> "2. *The list of trade unions*
>
> (1) The Certification Officer shall keep a list of trade unions containing the names of –
>
> (a) the organisations whose names were, immediately before the commencement of this Act, duly entered in the list of trade unions kept by him under section 8 of the Trade Union and Labour Relations Act 1974, and
>
> (b) the names of the organisations entitled to have their names entered in the list in accordance with this Part.
>
> (2) The Certification Officer shall keep copies of the list of trade unions, as for the time being in force, available for public inspection at all reasonable hours free of charge.
>
> (3) A copy of the list shall be included in his annual report.
>
> (4) The fact that the name of an organisation is included in the list of trade unions is evidence (in Scotland, sufficient evidence) that the organisation is a trade union.
>
> (5) On the application of an organisation whose name is included in the list, the Certification Officer shall issue it with a certificate to that effect.
>
> (6) A document purporting to be such a certificate is evidence (in Scotland, sufficient evidence) that the name of the organisation is entered in the list.

3. *Application to have name entered on the list*

(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.

(4) The Certification Officer shall not enter the name of an organisation in the list of trade unions if the name is the same as that under which another organisation –

(a) was on 30th September 1971 registered as a trade union under the Trade Union Acts 1871 to 1964,

(b) was at any time registered as a trade union or employers' association under the Industrial Relations Act 1971, or

(c) is for the time being entered in the list of trade unions or in the list of employers' associations kept under Part II of this Act,

or if the name is one so nearly resembling any such name as to be likely to deceive the public.

4. *Removal of name from the list*

(1) If it appears to the Certification Officer, on application made to him or otherwise, that an organisation whose name is entered in the list of trade unions is not a trade union, he may remove its name from the list.

(2) He shall not do so without giving the organisation notice of his intention and considering any representations made to him by the organisation within such period (of not less than 28 days beginning with the date of the notice) as may be specified in the notice.

(3) The Certification Officer shall remove the name of an organisation from the list of trade unions if –

(a) he is requested by the organisation to do so, or

(b) he is satisfied that the organisation has ceased to exist."

15. Sections 5-8 are headed "Certification as independent trade union". Section 5 defines "independent trade union" in terms which I need not set out. Section 6 entitles "a trade union whose name is entered on the list of trade unions" to apply to the Certification Officer for a certificate that it is independent, which he must issue if he is satisfied that it meets the criteria in section 5. By section 8 (1) a certificate issued under section 6 is "conclusive evidence for all purposes that a trade union is independent".

16. Section 9 gives an organisation aggrieved by the refusal of the Certification Officer to list it under section 2 the right to appeal to the EAT on a question of law.

17. The following Chapters of Part I contain a comprehensive scheme for the regulation of trade unions under the aegis of the Certification Officer, who is accorded numerous powers to ensure that unions are administered in a regular manner. Chapter VA, headed "Collective Bargaining: Recognition", which was inserted by the Employment Relations Act 1999, is of a rather different character. Its principal operative provision is section 70A. This gives effect to Schedule A1, which establishes a scheme under which a trade union can seek compulsory recognition from an employer for collective bargaining purposes: see para. 20 below.

18. Part III of the 1992 Act confers a series of rights on individual workers or employees in relation to trade union membership: these include taking time off for trade union activities (section 170). Part IV contains provisions about collective bargaining and Part V about industrial action (including the well-known immunities against liability in tort). I need not attempt to summarise here the rights and obligations arising from those provisions.

19. I should note one important point about the provisions referred to above. Most of them refer simply to "trade unions", and the rights and obligations for which they provide are not dependent on the union being listed. Some rights depend on the trade union in question being independent. Specifically, the rights conferred on union members by Part III of the Act apply only to members of an independent trade union (or in relation to membership of such a union); some of the rights conferred by Part IV as regards collective bargaining and consultancy are only enjoyed by independent trade unions (or their members); and only an independent trade union may apply for compulsory recognition via the Schedule A1 machinery. In most of those cases it is not a requirement that the union has a certificate of independence under section 6: in principle it is enough that it is in fact independent, within the meaning of section 5. But in the case of Schedule A1 a certificate of independence is required (see below), which in turn means that the union must be listed.

20. I need to say a little more about the Schedule A1 machinery. In bare outline, a trade union may make a request to an employer under paragraph 4 to be recognised for the purpose of collective bargaining in relation to a particular bargaining unit, subject to certain conditions. As noted above, one of those conditions is that it has a certificate of independence: see paragraph 6. Another is that the employer should employ more than twenty workers: see paragraph 7. If the employer does not respond to the

request, or refuses it after negotiation, the union may apply to the Central Arbitration Committee ("the CAC") under paragraph 11 or 12 to determine whether the proposed bargaining unit is appropriate and whether the union has the support of a majority of the workers constituting the unit. The CAC will only accept that application if various further conditions are met, including that at least 10% of the workers in the bargaining unit are members of the union: see paragraph 14 (5). If the application is accepted, an elaborate machinery comes into play. I need not give the details but it may result, if the union and the employer are unable to reach agreement, in the CAC making a declaration that the union is recognised for the purpose of collective bargaining, defined in paragraph 3 (3) as "negotiations relating to pay, hours and holidays" (save that the parties may agree that the negotiations may cover other matters – paragraph 3 (4)).

THE STATUTORY FRAMEWORK APPLYING TO FOSTER CARE

21. There are many statutory provisions governing the relationship between foster carers[3] and local authorities and the relationship between foster carers and looked after children. It is sufficient for the purposes of this appeal to refer to the following.

22. Section 22C of the Children Act 1989, which applies to England and Wales, specifies the ways in which children who are "looked after" (a term defined in section 22) by local authorities may be accommodated and maintained. Subsections (5) and (6) provide that in circumstances where a child cannot live with a parent or someone in (broadly) an equivalent position, they must be "placed" either in a children's home or with "a local authority foster parent". Section 105 provides for "local authority foster parent" to be defined by regulations.

23. The Care Standards Act 2000 establishes a statutory framework for the regulation of agencies engaged in various kinds of social care, including both local authorities and "fostering agencies", which are defined (so far as relevant) as undertakings which "[discharge] functions of local authorities in connection with the placing of children with foster parents" (see section 4 (4)). Section 23 of the Act empowers Ministers to publish national minimum standards applicable to agencies. By section 49 those standards apply also to local authorities in the exercise of their relevant functions.

24. The primary regulations governing the provision of foster care services in England are the Fostering Service (England) Regulations 2011. These contain provisions as regards two kinds of "fostering service", namely a fostering agency and a local authority fostering service. (There is also reference to a "fostering service provider", who is, in the case of an agency, a responsible "registered person" within the agency and, in the case of a local authority, the authority itself.) The relevant provisions for our purposes are in Parts 4 and 5, which it is convenient to take in reverse order.

25. Part 5 of the Regulations, which comprises regulations 23-32, is entitled "Approval of Foster Parents". It contains provisions under which a prospective foster parent (referred to as "X") is assessed for suitability by a specialist "fostering panel" on the basis of specified information and in accordance with specified procedures; and for

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[3] As will be seen, the statutory provisions use the term "foster parents"; but "foster carers" seems nowadays to be the more usual usage.

regular reviews following an initial approval, with a power to the fostering panel to terminate an approval where the parent is found no longer suitable (regulation 28). Regulation 27 (5) reads:

> "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 'foster care agreement')."

Schedule 5 is entitled "Matters and obligations in Foster Care Agreements" and reads:

> "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."

The policies referred to at 2 (f) relate to the prevention of abuse and neglect (regulation 12) and "acceptable measures of control, restraint and discipline of children placed with foster parents" (regulation 13).

26. Part 4 is entitled "Conduct of Fostering Services". I need only refer to regulation 17, which reads:

> "(1) The fostering service provider must provide foster parents with such training, advice, information and support, including support outside office hours, as appears necessary in the interests of children placed with them.
>
> (2) The fostering service provider must take all reasonable steps to ensure that foster parents are familiar with, and act in accordance with the policies established in accordance with regulations 12(1) and 13(1) and (3).
>
> (3) The fostering service provider must ensure that, in relation to any child placed or to be placed with a foster parent, the foster parent is given such information, which is kept up to date, as to enable him to provide appropriate care for the child, and in particular that each foster parent is provided with a copy of the most recent version of the child's care plan provided to the fostering service provider under regulation 6(3)(d) of the Care Planning Regulations."

27. The Government has issued guidance to local authorities under section 7 of the Local Authority Social Services Act 1970 under the title *The Children Act 1989 Guidance and Regulations Volume 4: Fostering Service* ("the Guidance").

THE *W v ESSEX COUNTY COUNCIL* LINE OF CASES

28. In *W v Essex County Council* the issue was whether a local authority owed a duty of care to foster carers with whom it had placed a child who had gone on to sexually abuse their own children. It was argued *inter alia* that it owed such a duty in contract. The statutory framework was broadly the same as that outlined above, and the carers were engaged under a "Specialist Foster Carer Agreement" of broadly the same character as the FCA. This Court held that the relationship between the plaintiffs and the authority was not contractual. Stuart-Smith LJ said, at para. 50 of his judgment:

> "[A]lthough 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 …, 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."

29. Shortly afterwards that conclusion was applied by this Court in the context of a claim of discrimination contrary to the Race Relations Act 1976 brought by a foster carer against a local authority: *Rowlands v City of Bradford Metropolitan District Council* [1999] EWCA Civ 1116. Such a claim could only be brought by an "employee". That term had an extended definition under the 1976 Act, but it too required that the putative employee worked under a contract. It had been held in both the industrial tribunal and the EAT ([1997] UKEAT 576/96)[4] that foster carers were employees (in the extended sense); but by the time that the case reached this Court *W* had been decided, and it was accepted that it followed from that decision that the appeal had to be allowed.

30. Both cases were followed by the EAT (Slade J presiding) in *Bullock v Norfolk County Council* [2011] UKEAT 230/10, which concerned whether a foster carer was entitled to be accompanied by a trade union representative, pursuant to section 10 of the Employment Rights Act 1999, at a meeting of a Fostering Panel which was to consider withdrawing her approval. Again, that right was only available to a "worker", and the statutory definition required the existence of a contract.

31. Although none of those cases is directly concerned with what I might call mainstream employment rights, such as those conferred by the Employment Rights Act 1996, the Working Time Regulations 1998 or the National Minimum Wage Act 1998, such rights are in all cases limited to "employees" or "workers", defined in terms which require, like section 296 (1), that the work in question is performed under a contract. The effect of this line of authority is thus that foster carers, at least in England, do not enjoy mainstream employment rights.

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[4] The decision of the EAT refers to the arguably analogous case-law about whether GPs in the NHS work under a contract. The most recent decision was then *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1991] UKHL 8, [1992] 1 AC 624, but there have been subsequent cases: see *North Essex Health Authority v David-John* [2003] UKEAT 0232/03, [2004] ICR 112.

32. We were referred to the recent decision in *Glasgow City Council v Johnstone* [2019] UKEAT 0011/18. In that case foster carers had made a claim for "whistleblower detriment" against Glasgow City Council, by which they were engaged, under Part V of the Employment Rights Act 1996. The Council took the point that they were not workers within the meaning of the Act: the definition in section 230 (3) is in substantially the same terms as section 296 (1) of the 1992 Act. The employment tribunal rejected that submission, and its decision was upheld by Lord Summers in the EAT. The Council referred to the *W* line of authorities, while acknowledging that the issue was one of Scots law and that the EAT on a Scottish appeal was accordingly not bound by them. Lord Summers found that the facts of the case before him were distinguishable from those in the English cases: as to this, see para. 55 below.

THE EVIDENCE

PRELIMINARY

33. The factual foundations on which we have to determine this appeal are not in an entirely satisfactory state. No evidence was adduced before the Certification Officer and he made no findings of fact. That is not a criticism of him. The only issue apparently raised by the application was whether the arrangements under which the members of the NUPFC worked could be distinguished from those in the *W* line of cases. It was tacitly acknowledged in correspondence following the application that they could not be, and accordingly he made his decision on a pure question of law. It was only when the NUPFC raised in the EAT the issue whether the decision involved a breach of its Convention rights that it became necessary to adduce evidence about the nature of the relevant relationships more generally. A number of witness statements were filed, and these also exhibited a group of published reports about the fostering service. There was no application to cross-examine any of the witnesses. No point appears to have been taken that the NUPFC should not be permitted to raise on appeal an issue that could not be resolved without findings of fact that had not been made below.[5]

34. The witness statements before the EAT were from:

- Mr Findlay, the prospective Chairman of the NUPFC;

- Ms Sarah Anderson, a foster carer for Hampshire County Council and Chair of the IWGB Foster Carers Branch for England and Wales (Ms Anderson is also one of the officers of the NUPFC named in the application form, but that is not the capacity in which she makes her witness statement);

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[5] That is not to say that such an objection would have been well-founded. As Mr Cooper emphasised on behalf of the Certification Officer, the position was awkward because of the unusual nature of an appeal under section 9. The process of applying for listing is not *inter partes*, and the other party to an appeal from the decision is the decision-maker himself: in that respect it is more like an application for judicial review. Even if the NUPFC had raised the Convention issue before the Certification Officer he would not have been well-placed to resolve it in the absence of an opposing party: he would not have been in a position to carry out factual investigations of his own. It was only in the EAT that it was possible for parties with the interest and resources to deploy the opposing case to intervene.

- Ms Katy Willison, the Director of Children's Social Care, Practice and Workforce at the Department of Education;

- Ms Sally Burlington OBE, Head of Policy (People) at the LGA; and

- Ms Amber James, Head of Resources and Partnerships, Children's Services, at Hampshire County Council, whose evidence was adduced by the LGA to respond to certain statements in the evidence of Ms Anderson.

35. The reports that were before the EAT were:

- a study commissioned by the Department of Education from a team at King's College London led by Dr Mary Baginsky and published in April 2017, entitled *The Fostering System in England: Evidence and Review* ("the Baginsky study");

- a report dated December 2017 from the House of Commons Education Committee entitled *Fostering* ("the HoC report");

- the report of a review carried out for the Department for Education by Sir Martin Narey and Mark Owers and published in February 2018 entitled *Foster Care in England* ("the Narey report") – we were told that the Baginsky study was commissioned in order to inform the Narey report;

- the Government's response to the HoC report, "*Fostering Better Outcomes*", dated July 2018; and

- a report dated February 2019 by the Fostering Network, a leading charity in the field of fostering, based on a survey of some 4,000 foster carers and entitled *State of the Nation's Foster Care* ("the Fostering Network Report").

36. Although the reports are interesting and impressive, they were not specifically directed at the issues which the EAT had to determine. As for the evidence in the witness statements, this does not add very much on questions of primary fact: it is mostly either anecdotal or argumentative. Accordingly some of the facts that I set out below have had to be rather generally stated.

THE ROLE OF FOSTER CARERS

37. In March 2018 there were about 75,000 looked after children in England. Of those, 73% (about 55,000 placements) were in foster care. We do not have the figures for the number of fostering households at that date, but in March 2016 it was about 44,000. Local authorities engage foster carers either directly or through an agency: the proportion is about 60:40. The great majority of foster carers undertake the role because it is something they want to do generally, and they are in that sense "professional"; but just under a fifth are family members or friends of a particular child who have become foster carers in order to help in their case (sometimes referred to as "kinship carers").

38. Placements vary greatly in character. Children of any age may be fostered, and placements may last from as little as a few days to two or more years. Although it is most common for a single child to be placed with a household, almost half of fostering households have two or more children. The mean duration of a placement is

about a year. Most of the children in question are the subject of a care order as a result of abuse, neglect or family dysfunction, but the circumstances can vary enormously. Many children will present with acute problems and will need special care and attention.

39. The essence of the role of a foster carer is to look after the fostered child throughout the placement as a member of their family. The phrase "quasi-parental" is often used and is appropriate, as long as it is understood that the legal responsibility remains with the local authority. That means that, although the actual hours spent directly looking after the child will vary according to the circumstances – most obviously, depending on whether they are attending school – it is an "always on" role.

40. Ms Willison refers to an international literature review carried out by the Rees Centre for Research in Fostering and Education at the University of Oxford entitled *Why Do People Become Foster Carers?*, which concluded, unsurprisingly, that the great majority of foster carers are motivated by altruism. The Narey report observes (ch 3):

> "Almost none of the carers we met prioritised pay as an issue and of those who submitted evidence, fewer than one in five mentioned pay as an issue … The fact that so few carers majored on pay – being much more likely to talk about how their foster children could be better supported – is of credit to them but we are very clear that there is no conflict between being a caring or loving foster carer and being adequately compensated. Foster carers need to maintain a family home and support themselves and their family."

THE FOSTER CARE AGREEMENT

41. As we have seen, fostering services are required by regulation 27 of the 2011 Regulations to enter into a written FCA with foster carers approved by them. Different fostering services may structure and present their FCAs in different ways, but the constraints imposed by the requirements of Schedule 5 mean that the essential material in them will be similar. We were shown the FCA between the London Borough of Haringey and Mr Findlay and Mr Da Silva: I will refer to this as "the Haringey FCA".

42. The Haringey FCA is an umbrella agreement. When a particular child is placed it will be supplemented by a separate Foster Placement Agreement which will be based on the care plan for that particular child. It runs to some nine pages in fourteen sections, essentially corresponding to the headings in Schedule 5. I need not give a summary, but I will refer to particular provisions below as appropriate.

CONTROL AND SUPERVISION

43. It is in the nature of the role of a foster carer that they have a high degree of day-to-day autonomy as to how they perform their role. The Guidance says:

> "Foster carers should be given the maximum appropriate flexibility to take decisions relating to children in their care within the framework of the agreed placement plan and the law governing parental

> responsibility. Except where there are particular identified factors which dictate to the contrary, foster carers should be given delegated authority to make day to day decisions regarding health, education, leisure, etc."

44. Having said that, a foster carer does not have the freedom of an ordinary parent. They are obliged to look after the child in accordance with the care plan, which may be detailed and prescriptive. They are issued with a handbook and obliged to keep records about the children in their care. They are subject to oversight and supervision by the fostering service. By way of example, para. 1 (a) of the Haringey FCA (reflecting the requirements of Standard 21) reads:

> "Foster carers approved by Haringey Fostering Service will be supported and supervised by a named supervising social worker, who will visit every six weeks as a minimum. They will also visit on request and as required to support carers. The supervising social worker will write formal reports of their visits every six weeks. In some cases the level of visiting and support will be agreed with your supervising social worker and authorised by senior managers. At least one visit each year will be unannounced."

There is a formal complaints system for dealing with complaints against foster carers, with the possibility of referral to an Independent Review Mechanism.

45. Foster carers are subject to an annual review of their approval (over and above the supervision associated with a particular placement): in the first year this must be by the Fostering Panel. The Haringey FCA also requires a medical report every other year. The fostering service has the power to terminate a placement at any time.

46. Foster carers are required to maintain their skills and training. Paras. (f) and (g) in section 1 of the Haringey FCA deal with the obligation of foster carers to attend training, which differs between carers who have been approved for less than eighteen months and those who have been approved for longer; but both are required to undertake training or other learning and development, and to attend at least eight meetings of a foster carers support group.

PAYMENTS TO FOSTER CARERS

47. It is in this area that the evidence before the EAT was particularly unsatisfactory. Some basic information is simply lacking. Such information as there is in the published reports is partial and illustrative and not always to the same effect. This may reflect what was described in the Narey report (p. 12) as "wide inconsistencies and a general lack of clarity about the compensation and reward given to carers". As will be seen, these difficulties led the EAT to decline to reach a conclusion on one of the issues before it. However, in my view a sufficiently clear overall picture does emerge, which I can summarise as follows.

48. *Types of payment.* Payments made to foster carers during a placement are of essentially three kinds – an "allowance"; "fees"; and reimbursement of expenses. (In

addition, a minority of fostering services pay a "retaining fee" to foster carers between placements, but these are not relevant for our purposes.)

49. *The "allowance"*. Standard 28, published by the Government under section 23 of the 2000 Act, requires fostering services to pay to foster carers, during the time that a child is placed with them, a "National Minimum Fostering Allowance", which is described as being intended (when taken with the reimbursement of expenses – see below) to "cover the full cost of caring for each child". The amount of the allowance is set annually by the Government and varies by reference to geographical area and the age of the child: in 2017 the range was between £125 and £219 per week. The prescribed amount is a minimum: some fostering services pay more. Of its nature, being a standard amount, the extent to which the allowance paid in a particular case corresponds to the actual cost of caring for the child (to the extent that that is calculable) can only be approximate, and there is evidence that many foster parents believe that it does not fully do so.

50. *Fees: general*. These are amounts paid in addition to the allowance. The Narey report refers to them (p. 24) as being paid "to remunerate the foster carers for their experience, skills and time". The HoC report (para. 52) says the same except that it uses the language of "recognise and reward" rather than "remunerate". Although there is no obligation to pay such fees, they are in fact paid in the majority of cases. The evidence is unclear about the exact proportion. According to the Narey report (p. 44), "nearly all" local authorities and agencies pay fees. A footnote cites an estimate in a Fostering Network report (not the one in evidence) that 86% of local authority foster carers received a fee and that "almost all" agency carers did so: of those who did not, most were caring for children up to four years old or were kinship carers. However, the 2019 Fostering Network survey found (p. 21) that only 60% of foster carers said that they received a fee. We cannot resolve that difference, though I suspect that it may reflect differences in the ways that questions were framed rather than a real discrepancy.[6] Fortunately, for our purposes it is enough to say that fees are paid in most cases. I will refer to foster carers who are paid a fee during a placement in addition to the allowance as "fee-paid foster carers"[7] and to those who receive only the allowance as "allowance-only foster carers".

51. *Fees: amounts*. The amount of the fees paid varies both between local authorities/agencies and according to such factors as experience and the anticipated demands of the placement. Both the Narey report and the Fostering Network report give some figures, though they are expressed differently. The Narey report refers to one authority where the range of fees is from £120 to £220 per week. The Fostering Network survey gives a breakdown between ranges of figures per month, from under

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6 One problem with obtaining information may be that, although para. 28.5 of Standard 28 requires that there should be "a clear and transparent written policy on payments to foster carers that sets out the criteria for calculating payments and distinguishes between the allowance paid and any fee paid", there is evidence that this requirement is frequently not complied with, so that foster carers do not always know how the payments that they receive are made up.

7 The term is not ideal, because in some contexts "fee-paid" refers to a worker being paid a fee for part-time work, as opposed to being on a salary; but of course that is not the intended distinction here.

£100 (3%) to over £1,700 (7%). The range with the highest proportion was £300-£700 (28%). If we needed to use those figures as evidence of what was typical, it would be necessary to ask a number of questions about them; but I need only refer to them as illustrations.

52. *Expenses.* Foster carers are able to claim reimbursement from their fostering services for necessary expenditure in relation to a child placed with them of a kind which is not regarded as covered by the allowance. The evidence does not shed any light on the kinds of expenditure which are and are not reimbursable in this way.

53. *Tax and benefits*. Ms Willison summarises the position about tax and benefits as follows:

> "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."

It follows that, depending on their circumstances, some foster carers will pay tax on part of their "income from fostering", which in principle includes the allowance as well as fees.

54. *The Haringey FCA.* The only reference to payments in the Haringey FCA is under section 1 ("Support, Supervision and Training"). Under the sub-heading "Finance Support", sub-para. (d) reads:

> "Financial support is provided by the Directorate through the 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."

Sub-para. (e) gives details of the circumstances in which a retainer fee is payable. There is nothing said about the payment of other fees. That might be thought to mean that Haringey does not pay a fee during placements, but I do not think that that is a necessary inference. The FCA closely follows the subject-matter prescribed by Schedule 5 to the 2011 Regulations. That says nothing as such about recording what

payments the carer is entitled to. It does require that it should record "any support and training" (para. 1 (b)), and Haringey evidently regarded "support" as including payment of the allowance. But a fee might be regarded as conceptually distinct from "support", in which case it would not necessarily be referred to: an FCA is not the same kind of creature as an employment contract. It is clear that specific paperwork would be generated on the occasion of each placement. Unfortunately Mr Findlay's witness statement does not directly address the question of what sums he is paid as a carer. He does say (para. 14) that "carers do not usually get any fee whilst they do not have a child". Although that is directed at a separate question, the necessary implication, presumably based on his own experience, is that a "fee" is paid during placements; but it is not possible to be sure that he is using the term in contradistinction to "allowance". Again, this uncertainty is not very satisfactory, but it does not matter for the purpose of the issues which we have to decide.

55. *The position in Scotland.* As noted above, the evidence before us relates almost exclusively to the position in England. It appears from the Fostering Network report that although allowances are paid to foster carers in Scotland that is not as the result of any Government-imposed standard. It appears from *Glasgow v Johnstone* that the form of agreement used by the Council in that case provided explicitly for the payment of both fees and an allowance; and it was on that basis that Lord Summers felt able to distinguish the English authorities.

56. *Overview.* The Narey report says at ch. 3 that "the reality is that fostering is reasonably remunerated". It goes on to give illustrative examples:

> "In one London local authority, if a carer is looking after a 16-year-old child, the total of their fee and allowances will be in the region of £450 a week. For carers recruited by IFAs [independent fostering agencies], their total package might be higher, and in our research, we observed that the mean total of pay and allowances paid to carers by one particular IFA was £585 a week."

The report also refers to the favourable tax treatment of income from fostering. It is clear from the Fostering Network report that many foster carers would not accept that pay is "reasonably remunerated". I express no view about that. I quote the report simply to give an illustration of the kinds of sum that foster carers may be paid, taking allowance and fees together. I should add for completeness that foster carers may, like parents, have jobs or other paid occupations, but the Narey report observes that:

> "It is often difficult to combine other paid work with fostering and with some placements and fostering services require one partner in a couple to be a foster carer full time."

It quoted survey findings to the effect that 56% of respondents said that their household income was reliant on the money they receive from fostering, with two-thirds of carers having no other paid work.

THE OBJECTIVES OF THE NUPFC

57. At para. 8 of his witness statement Mr Findlay summarises the objectives of the NUPFC as being:

> "(a) Collective bargaining about pay and conditions;
>
> (b) Amending or changing fostering arrangements;
>
> (c) Providing representation at disciplinary meetings;
>
> (d) Mediating in disputes;
>
> (e) Representing members in tribunal claims or other related court actions."

SHOULD FOSTER CARERS HAVE "WORKER STATUS"?

58. Some of the evidence addresses the question whether it is desirable that foster carers should have "worker status". The focus is on entitlement to individual employment rights and it is accordingly not directly relevant to the issue in this appeal. However, as will appear, it is relevant to some of the arguments advanced, and I need to summarise its effect.

59. In a section headed "Employment" (pp. 46-47) the Narey report notes that "some foster carers, fostering organisations and trades unions are calling for foster carers to be regarded as workers or employees", and it refers to there having been "a number of cases at court in both Scotland and England concerning the employee status of carers"[8]. It also refers to the fact that some foster carers have joined the GMB or the IWGB[9]. After quoting the view of one commentator who was opposed to carers having "employment rights", it continues:

> "David Williams, Chief Officer of Glasgow City Health and Social Care Partnership, and in the wake of a challenge in a Scottish Court, was even more emphatic:
>
> > 'Any tribunal which decided foster carers should be employees, without any requirement to consider the interests of children, could have devastating consequences. There isn't an organisation or employer in any business across the UK who could employ someone to work 24/7, for 365 days a year, for very obvious reasons. It would mean - literally overnight - the end of foster care.'
>
> 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

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8 I should say that we were not referred to any such cases apart from those noted at paras. 28-32 above. It is reasonable to assume that *Glasgow v Johnstone* was a cause for concern.

9 It says that there were "some 500" foster carers from Yorkshire and North Derbyshire in the GMB and that "around 60" had joined the IWGB in 2016. We were not given any more up-to-date numbers.

> work. And the current helpful tax and benefit arrangements would be most unlikely to be extended to employed carers.
>
> It may be for the courts to determine the employment status of carers. But we believe that were it to be obtained, employment would radically and negatively affect the heart of fostering and would not be in the interests of children in care. We encourage the Government and local authorities to resist such a fundamental change."

That recommendation had been trailed in an earlier section reviewing the related question of whether foster carers should be recognised as "professionals". At p. 11, having expressed the view that they should not, the report says:

> "Similarly, we do not believe that carers should become employees of either their local authority or their fostering agency. Carers overwhelmingly see fostering as a vocation, and see themselves primarily as substitute parents. We can see where employment status might bring some protections to carers. But it would also bring significant obligations, more oversight, and drastically impinge on their independence. Indeed, we believe that the unique status and heart of fostering would be lost."

60. The Department's response endorsed the views of the Narey report: see pp. 28-29. Again, I should set out what it said fairly fully. After referring to the Narey report's recommendation it acknowledged that some foster carers felt under-supported and under-respected and that it was accordingly not surprising that some "have felt the need to seek formal employment status". But it believed that that was not the right course. It said:

> "Describing what would constitute employment status for foster parents to young people and their carers is met with confusion and, in many cases, dismay. As one young man wrote to the reviewers:
>
> > 'Vulnerable children are not commodities. Coming from a troubled background, they already have a sense of rejection and a lack of belonging due to not being with their own family. My long-term foster carers constantly reminded my brother and I that we were "just a job" to them. This made us feel worthless and was no better than being with our own family, which foster care should never be like. Vulnerable children being promoted as a means to make money is wrong. It is unethical, it does not benefit their wellbeing, and it sends the wrong message about the benefits of being a foster carer.'
>
> Any change to the employment status of foster parents would have a fundamental impact on the family-centred nature of fostering. Furthermore, it would bring about a significant adjustment to the way the care system is structured, increasing the potential for greater use of residential care. This change would not be motivated by the best interests or wellbeing of children. It would weaken the concept of a 'substitute family'. 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. As discussed at the start of this chapter, there are better ways to offer well-deserved rest, respite and support to foster parents. To consider foster parents as staff members of an agency ultimately places the interests of the carer as the highest priority, not the child. We do not accept that this should be the future of fostering."

61. In her witness statement on behalf of the LGA Ms Burlington says (at para. 3) that "[t]he LGA's primary concern in relation to this case is ... in the likely impact on children in care if foster carers have the status of workers". Having emphasised the central importance to fostered children of being part of a family, she continues, at para. 6:

> "The LGA is concerned that if foster carers had worker status, this would undermine the fulfilment of foster children's needs for a stable and loving family and particularly their sense of being like any other member of the family."

She goes on to develop those points, primarily by reference to the Narey report and the Department's response.

62. It will be apparent that, as I have said, the concerns identified above about the recognition of "employment status" for foster carers relate to the impact of individual employment rights and not to questions of union membership or union recognition (the reference in the Narey report to some foster carers having joined trade unions appears only to be intended to explain the pressure for employment status). Ms Willison acknowledges that point at para. 50 of her witness statement. Having in the previous paragraphs quoted passages from the Narey report and the Department's response, she says:

> "Whilst the appeal in this case relates specifically to the extension of trade union rights to foster parents, the same basic principles apply as above. For example, if foster parents were to have rights under TULRCA 1992, including time off for trade union activities, taking industrial action or other action short of a strike, this would raise serious concerns from both a practical and policy point of view, and would have a fundamental impact on the family centred nature all foster care. Crucially, it also brings into question the message that is sent to vulnerable children and young people living in foster care. Many of them understand the financial necessity of payments to foster parents in order to support them, buy them clothes and food. But the idea that someone is paid to be interested in them, to show them love and affection, can never sit easily. Children need to see that their foster parent is not caring for them because it is their "job" or for money, but they are doing it for the children, to show them care, love and affection, as a parent would. Even the perception for example that foster parents 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."

63. As regards the evidence of the Appellants, Mr Findlay does not in his witness statement address the objections to worker status beyond expressing the general view (at para. 24) that "union recognition would benefit the foster carer, the child, and the local authority". However, in her witness statement Ms Anderson says:

> "28. As foster parents we provide all the children in our care with nurture, love and support within a family home. This is incredibly important. But I do not see that this is in any way incompatible with foster carers being allowed to form a trade union to represent their interests. Many workers in society have a vocation underlying what they do. This does not mean there is anything morally wrong about them having employment rights in general or the right to form a trade union in particular. It would never be suggested that a nurse's right to unionise, for example, was in any way incompatible with his or her commitment or vocation to care for ill patients.
>
> 29-30. …
>
> 31. I do not consider that the right to unionise would be in anyway detrimental to the children in our care. In fact I consider that if foster carers were properly represented it would improve our ability to care for and produce good outcomes for these children and young people. I also consider it would improve retention figures and the recruitment of foster carers."

64. The Fostering Network 2019 report records that its survey showed that 34% of those who responded said that they were happy with their "employment status", with some expressing views similar to those of the Narey report. Over 53% were not happy with it, believing (broadly) that they should be "employed" as opposed to "self-employed".

65. It is convenient at this stage to mention the submissions made by Mr Burton on behalf of ECRU, though they do not constitute evidence. The gist of ECRU's case is that the issue of whether foster carers should enjoy employment rights generally, or the right to join a trade union dedicated to their interests, impacted on the best interests of children; that those interests should accordingly be a primary consideration in any decision on that issue, in accordance with article 3 (1) of the United Nations Convention on the Rights of the Child; that that in turn required a proper assessment of the impact of any such decision on children in foster care; and that no such assessment had been performed. ECRU does not itself take any view about what the outcome of such an assessment should be: Mr Burton acknowledged that there were arguments on both sides. But he supported the Appellants' case to the extent that it was his submission that the present state of affairs required justification and that no proper justification could be established in the absence of a full child-focused assessment, which had not occurred.

THE ISSUES

66. As already noted, the Appellants accept before us that the effect of the decisions in *W v Essex County Council* and *Rowlands v City of Bradford Metropolitan District Council*, by which we are bound, is that foster carers operating under the 2011

Regulations do not provide their services under a contract, and that accordingly (subject to the issues considered below) they are not "workers" for the purposes of the 1992 Act. We are thus concerned only with whether their consequent exclusion from the right to be listed under section 2 of the 1992 Act would give rise to a breach of their rights under articles 11 and/or 14 of the Convention.

67. As regards article 11, the headline issues are:

(1) Is article 11 engaged? If so:

(2) Does the denial of a right to be listed constitute an interference with the article 11 rights of the NUPFC or its members? If so:

(3) Is that interference justified? If not:

(4) Can the definitions in sections 1 and/or 296 (1) be "read down", using the special interpretative obligation under section 3 of the 1998 Act, so as to render section 2 compliant?

I need not at this stage analyse the issues under article 14.

68. Ms Crasnow was concerned to emphasise that the claim does indeed relate only to the right to be listed under section 2 of the 1992 Act. If the Court were to conclude that the denial of that right gave rise to a breach of the Convention rights of the NUPFC or its members, and felt able to read down the relevant definitions in order to enable it to qualify for listing, it would not follow that those definitions were required to be read down similarly as regards any other provision of the 1992 Act. On the contrary, it would be necessary to ask on a case-by-case basis, if and when claims relating to other rights were raised, whether the unavailability of the right in question constituted a breach of article 11 (or article 14): the nature of the arguments about both interference and justification might vary widely depending on the nature of the right. As she put it, adopting a metaphor suggested by Green LJ, the importance of acquiring a right to be listed was that it would give the NUPFC and its members the ticket to the fairground, but it did not in itself mean that they would be entitled to go on any of the rides. Still less, she said, would a decision in the NUPFC's favour mean that foster carers were entitled to individual employment rights: the present appeal was concerned only with Convention rights, which are not typically engaged in individual employment cases.

69. Lord Hendy made the same points, though he said that the Court's reasoning in upholding (if we did) the claim as regards listing would be likely in practice to determine some of the issues that would arise in any subsequent claims about particular substantive rights under the 1992 Act. In particular, he referred to the right to invoke the compulsory recognition procedure under Schedule A1

70. Mr Cooper, in his clear and thoughtful submissions, contended that the Appellants' emphasis on the limited nature of the present issue demonstrated (deploying a different metaphor) that they had chosen to fight on the wrong battleground. He contended that listing in itself had no legal consequences: as noted at para. 19 above, the provisions of the Act confer or impose rights and obligations on "trade unions", irrespective of whether they are listed. He acknowledged that that was not quite the

whole picture, because only listed trade unions can be certified as independent and thus become entitled to apply for recognition under Schedule A1. But he maintained nonetheless that it was extremely unsatisfactory that the chosen battleground concerned (mixing the metaphor further) a gateway issue. It was not simply that it meant that the real battles would remain to be fought on a later occasion; it meant also that the question of justification in particular had to be considered in the abstract.

71. I understand the concerns expressed by Mr Cooper. We are bound to address the claim before us, but it is important to emphasise at this stage that that raises only a very limited and specific issue. It may be, as Lord Hendy says, that our reasoning will nevertheless have some wider implications as regards trade union rights for foster carers; but it is not suggested, and for the reason given by Ms Crasnow I do not believe, that it will have implications for the question whether they enjoy individual employment rights.

(A) ARTICLE 11

72. Article 11 of the Convention reads:

> "*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."

73. The extent to which the right referred to in the final part of article 11.1 goes beyond the literal "right to form and join trade unions" is the subject of a good deal of case-law, but I need not discuss it here. For present purposes I will simply call it "the article 11 right"[10], without prejudice to the question of precisely how far it extends. Although the article 11 right is expressed as a right enjoyed by individuals wishing to form or join a trade union, it was common ground before us that the right is enjoyed by trade unions themselves as well as by their members.

(1) ENGAGEMENT

74. The question whether a Convention right is "engaged" may mean rather different things in different contexts. In this context what it refers to is whether foster carers working under the (non-contractual) arrangements outlined above fall within the "scope" of article 11 – or, to put it another way, whether the article 11 right extends to

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[10] That is not strictly accurate, because article 11 is of course also concerned with freedom of association more generally, but there should be no confusion in this context.

them. It is common ground that the definition of a "worker" as a matter of domestic law cannot be determinative of that question.

75. The parties were agreed that the starting point is the decision of the Grand Chamber of the European Court of Human Rights ("the ECtHR") in *Sindicatul "Pastorul Cel Bun" v Romania* app. no. 330/09, [2014] IRLR 49, ("the *Good Shepherd* case"). In that case a number of Orthodox priests in Romania had formed a trade union and applied for it to be granted legal personality and entered in the register of trade unions maintained under Romanian law. The position of priests of the Orthodox Church in Romania is peculiar. It is, broadly speaking, governed by a statute adopted by the Church's Synod but approved by Government ordinance. This provides for the Church's "autonomy", one consequence of which is that disciplinary decisions are outside the jurisdiction of the civil courts. The state pays the salary of clergy, as a percentage of the salary of teachers. It appears from paras. 42-44 of the judgment that although from 2004-2011 the priests were parties to what the Court describes as "employment contracts" with their Archbishop, in 2011 the Ministry of Labour ruled that "the Labour Code was not applicable to the employment relationship between [the Church] and members of the clergy" and that "the Church was not obliged to sign individual employment contracts individual employment contracts with them": the contracts were accordingly replaced with "appointment decisions", which among other things stated that their salaries "shall be determined in accordance with the statutory provisions governing remuneration of members of the clergy". The application for registration was initially granted, but the Romanian courts quashed it on the basis that it was (in short) contrary to Church law.

76. The Grand Chamber found that article 11 was engaged. The relevant part of its judgment is at paras. 130-150, where it addresses the general principles relating to the right to form a trade union and applies those principles to the facts of the case. The argument of the Romanian government on the issue of the engagement of article 11, summarised at para. 140, was 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".

77. The Grand Chamber's reasons for rejecting that argument begin, at para. 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."

78. At para. 142 the Grand Chamber says that it "will apply the criteria laid down in the relevant international instruments". It had previously summarised the instruments in question, at paras. 56-61 of its judgment. It began with Convention 87 of the International Labour Organisation ("the ILO") on Freedom of Association and Protection of the Right to Organise. I need only note article 2, which reads:

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

At para. 57 it quotes from ILO Recommendation no. 198 "concerning the employment relationship" ("ILO R198"), as follows:

> "9. 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 characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.
>
> ...
>
> 11. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:
>
> (a) allowing a broad range of means for determining the existence of an employment relationship;
>
> (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and
>
> (c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.
>
> ...
>
> 13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:
>
> (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

> (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker."

It also refers to articles 7 and 12 of the European Social Charter and to EU Council Directive 2000/78/EC, but nothing turns on those for our purposes.

79. The Grand Chamber continues, at para. 143:

> "Having regard to the above considerations, the Court observes that the duties performed by the members of the trade union in question entail many of the characteristic features of an employment relationship."

It goes on to summarise the work done by clergy, at the direction of their bishop. It continues:

> "144. Admittedly, as the Government pointed out, a particular feature of the work of members of the clergy is that it also pursues a spiritual purpose and is carried out within a church enjoying a certain degree of autonomy. Accordingly, members of the clergy assume obligations of a special nature in that they are bound by a heightened duty of loyalty, itself based on a personal, and in principle irrevocable, undertaking by each clergyman. It may therefore be a delicate task to make a precise distinction between the strictly religious activities of members of the clergy and their activities of a more financial nature.
>
> 145. However, the question to be determined is rather whether such special features are sufficient to remove the relationship between members of the clergy and their church from the ambit of Article 11. In this connection, the Court reiterates that paragraph 1 of Article 11 presents trade-union freedom as one form or a special aspect of freedom of association and that paragraph 2 does not exclude any occupational group from the scope of that Article."

After addressing two other points to which I need not refer, it concludes, at para. 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."

80. The fundamental points which emerge from the Grand Chamber's approach is that article 11 will be engaged, as regards trade union rights, where workers are parties to "an employment relationship"; and that, in determining whether an employment

relationship existed on the facts of the case before it, it proceeded on the basis that the correct approach was to be found in ILO R198. Two points about ILO R198 are material for our purposes.

81. First, paragraph 9 provides 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. The Appellants submit that the phrase "contractual or otherwise" shows that for the purpose of article 11 it is immaterial whether an employment relationship is contractual in character. Strictly, I doubt if that is the correct reading: the phrase is used in reference not to the employment relationship itself but to the "contrary arrangement". However, whether that is right or not, I agree that there is nothing in ILO R198 that suggests that an employment relationship must be contractual, so as to exclude cases like the present where the essential elements of the relationship are prescribed by law or otherwise administratively. Such a requirement would promote form over substance in a way which would be inconsistent with the Strasbourg jurisprudence generally. It would also create difficulties given that member states may differ in whether they characterise particular kinds of relationship as contractual. In any event, whatever the precise reasoning, the EAT held at para. 71 of its judgment that in the article 11 context an employment relationship need not be contractual and the Respondents have not challenged that. I would add that in *O'Brien v Ministry of Justice* [2013] UKSC 6, [2013] ICR 499, which concerned the rights of judges under the EU Part-Time Workers Directive (which refers to "part-time workers who have an employment contract *or employment relationship*"), the Supreme Court had no difficulty in applying the concept of a non-contractual employment relationship in a domestic context.

82. Secondly, the facts which it is said in paragraph 9 should primarily guide the determination of the existence of an employment relationship are those relating to (a) "the performance of work" and (b) "the remuneration of the worker". The kinds of fact that are likely to be material are identified in paragraph 13 under heads (a) and (b) respectively. It is clear from paragraphs 11 and 13 that the ILO recognises that the criteria for recognising an employment relationship cannot be precisely defined and that a multi-factorial assessment is required having regard in particular to the "indicators" that it lists. At some points in the oral submissions before us it appeared to be being suggested that the effect of ILO R198 is that an employment relationship should be found to exist wherever a worker [a] performs work for which [b] he or she receives "remuneration". That is not correct: the exercise is more nuanced.

83. Returning to the reasoning of the Grand Chamber, the approach which it took, against the background of ILO R198, was as follows. It started, in para. 143, by observing that the work done by the priests had "many of the characteristic features of an employment relationship". It then, in para. 144, acknowledged that the relationship had "special features" (a phrase also used in para. 141) because of the nature of the work of the clergy and the degree of autonomy enjoyed by the Church. Finally, at para. 145, it considered whether those features were sufficient to deprive it of the character of an employment relationship[11]. It did not address the issue of

[11] In fact the phrase used in para. 145 is "sufficient to remove the relationship between members of the clergy and their church *from the ambit of Article 11*", but it does not appear that the Grand Chamber is treating that as a separate question from whether they were in an employment relationship: see para. 148.

remuneration, no doubt because the priests were paid wages in the ordinary way (see para. 75 above).

84. I should note for completeness that, although the Grand Chamber found that article 11 was engaged and that the refusal to register it constituted an interference with the trade union's article 11 rights, it held that that interference was justified in the interests of preserving the autonomy of the Greek Orthodox church in Romania in accordance with the governing statute.

85. The EAT held that the evidence before it was insufficient for it to be able to decide whether foster carers generally, or the members of the NUPFC in particular, were in an employment relationship with the local authority or agency for which they provide their services. Its concern was principally with the evidence about remuneration. After reviewing the evidence about the payment of fees, it said, at para. 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."

After noting at para. 71 that there was no need for the relationship to be contractual in character, it said, at para. 72:

> "… 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 [an employment] relationship. If that is so, then the Art 11 right to join and form a trade union could potentially be engaged."

Its inability to reach a decision on this aspect did not cause the EAT any difficulties in the resolution of the appeal because it went on to hold that even if article 11 was engaged the NUPFC's rights were not interfered with and in any event that such interference as there might be was justified.

86. The Appellants submit that the EAT should have found, applying the approach in the *Good Shepherd* case, that foster carers were in an employment relationship and accordingly that article 11 was engaged. The Respondents submit that it should in fact have gone further and made a positive finding that there was no employment relationship, and accordingly that article 11 was not engaged.

87. I find it easiest to start by considering the position of fee-paid foster carers. These are the majority, and I suspect also that they are more representative of those who are interested in joining the NUFPC, since the Narey report suggests that (unsurprisingly) a disproportionate number of allowance-only foster carers are kinship carers, and it seems reasonable to assume that these will be less likely to wish to join a trade union.

88. I start with the question of remuneration. As to this, I must respectfully disagree with the EAT's view that on the available evidence the fee "does not appear to [represent] remuneration for work done". It is in my view clear from the evidence summarised at paras. 50-51 above that the fee represents a reward for the service provided by the foster carer to the fostering service by providing care and accommodation to the child; or, to put the same thing another way, for the carer's work and skill in providing that service. In my view that must constitute remuneration in the relevant sense. That conclusion does not depend on the labels used by third parties, but it is nevertheless significant that both the Narey report and the HoC report use the language of "reward" and/or "remuneration". The EAT says that the amount of the fee "does not appear to bear any real relationship to the amount of work done". That may be true in the sense that it is not calculated by reference to any measurement of the number of hours spent in a day or a week actively caring for the child in question; that would hardly be possible, given the nature of the fostering role. But it is paid in respect of the days or weeks during which a child is fostered, and that seems to me to be what matters. The EAT also refers to the fee as "small". I can see the argument that if a payment is small enough it might not be realistic to describe it as remuneration at all; but the kinds of amount described in the evidence do not in my view fall into that category.

89. However, the payment of remuneration is only one indicium of the existence of an employment relationship. It is necessary to look also at what ILO R198 calls "the facts relating to the performance of [the] work". Both Mr Cooper and Mr Collins argued that the nature of the foster carer's role was fundamentally inconsistent with the existence of an employment relationship. They made three points in particular:

(1) As the Certification Officer's Respondent's Notice pleads:

> "The essential character of foster care is familial and caring, not occupational. The provision of foster care is not an economic activity."

The obligation undertaken by a foster carer is, as it is put in paragraph 2 (a) of Schedule 5 to the 2011 Regulations, "to care for any child placed with them as if the child was a child of the foster parent's family". The point is not capable of much elaboration, but it is supported in the evidence referred to above about what motivates most foster carers to take the role: see para. 40 above.

(2) Following from (1), there is no provision for any of the characteristic elements of an employment relationship – no specific duties, working hours, holidays or rest breaks etc.

(3) Even if most foster carers are in fact paid a fee, the fact that many are not is an important pointer to the fact that the relationship is not a wage/work bargain of the kind which is at the heart of an employment relationship.

Those elements, they submitted, constitute a special feature, or features, of the kind referred to by the Grand Chamber in the *Good Shepherd* case (albeit found not to be present on the facts of that case).

90. That submission has force, and it has given me some pause; but in the end I do not accept it. I quite accept that the role of a foster-carer has the special features relied on by the Respondents, but I do not believe that those features are inconsistent with the existence of an employment relationship in the sense necessary to engage the article 11 right. The essence of the relationship is that foster carers provide a service to the foster service which engages them, namely the service of accommodating and looking after the child who is placed with them: that is not altered by the fact that that service is quasi-parental in character and does not have regular hours or neatly specifiable duties. As appears from paras. 43-46 above, although foster carers have a great deal of day-to-day autonomy, they are obliged to work within the parameters of the care plan established by the local authority, they are regularly supervised and are ultimately under its control. It is clear from the *Good Shepherd* case that the concept of an employment relationship, in the context of article 11, extends to non-standard occupations like that of the clergy. As regards point (3), see para. 92 below.

91. I am supported in that conclusion by the decision of the Grand Chamber of the Court of Justice of the European Union ("the CJEU") in *Sindicatul Familia Constanța v Direcția Generală de Asistență Socială și Protecția Copilului Constanța* C-147/17, [2019] ICR 211. This was a reference in a claim by foster carers in Romania under the domestic legislation implementing the Working Time Directive. The court in Romania had held the claimants fell outside the scope of that legislation. The CJEU held (a) that foster carers were "workers" within the meaning of the Directive but (b) that they were excluded from its effect by an express derogation for cases where "characteristics peculiar to certain specific public service activities … inevitably conflict with [its requirements]". For present purposes it is element (a) that is material. Paras. 41-48 of the judgment of the Grand Chamber read:

> "41. For the purpose of applying Directive 2003/88, the concept of 'worker' may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law. It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that 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 (*Union Syndicale Solidaires Isère*, C-428/09, paragraph 28 and the case-law cited).
>
> 42. It follows that an employment relationship implies the existence of a hierarchical relationship between the worker and his employer. Whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties (*Holterman Ferho Exploitatie*, C-47/14, paragraph 46).
>
> 43 In the present case, it is clear from the order for reference that the foster parents in question in the main proceedings must provide, in

> principle on a continuous basis, for the care and education of the children placed with them by a public authority, and in return for that work they receive remuneration. In addition, the foster parents must not merely be approved, but must also, in accordance with Article 8(1) of Government Decree No 679/2003, conclude a 'special employment contract' with the relevant specialist service for the protection of minors. That contract applies for the period of validity of the authorisation and its performance begins when the placement decision is made. It may be suspended or terminated according to national employment rules. The foster parents also appear to have a right to social security and to professional training.
>
> 44. Moreover, according to the national legislation at issue in the main proceedings, the foster parents must allow the specialist service for the protection of minors, with which they concluded a contract, to supervise their professional activity and to assess the development of the child placed with them.
>
> 45. It follows from all of these factors that the individual applicants in the main proceedings are, with respect to the public service to which they are contractually linked, in a hierarchical relationship, evidenced by permanent supervision and assessment of their activity by that service in relation to the requirements and criteria set out in the contract, for the purpose of fulfilling the task of protecting the minor, which is conferred on that service by law.
>
> 46. Such an assessment is not called into question by the fact that foster parents, such as the individual applicants in the main proceedings, have broad discretion as to the daily performance of their duties or that the task conferred on them is a 'task of trust' or a task of public interest (see, to that effect, *Haralambidis*, C-270/13, paragraphs 39 to 41, and *Balkaya*, C-229/14, paragraph 41).
>
> 47. In addition, the fact that the work performed by foster parents is largely comparable to the responsibilities taken on by parents with regard to their own children is not, in the light of what was noted in paragraphs 43 to 45 above, sufficient to prevent those foster parents from being qualified as 'workers' within the meaning of Directive 2003/88.
>
> 48 It follows that the foster parents in question in the main proceedings must be regarded as 'workers' within the meaning of Directive 2003/88."

That decision is not binding on us because it is not a case under the Convention, but the Strasbourg and Luxembourg approaches to the issue of employment status are closely aligned, and the passage quoted is in my view a good indication of the likely approach of the ECtHR if the present issue fell to be considered by it. In any event, the reasoning is substantially similar to my own.

92. I turn to the position of allowance-only foster carers. This is not straightforward. I accept that if the allowance is intended by the Secretary of State only to represent a (necessarily broad-brush) estimate of the direct marginal costs (such as food and clothing) of having an extra child in the home, it might be difficult to say that the foster carer received any element of reward. But if it is intended also to make some contribution to the general running costs of the household, in my view that would be sufficient to constitute remuneration in the sense with which we are concerned – that is, for the purpose of establishing an employment relationship. Unfortunately the evidence does not directly address the question of the conceptual basis for the allowance; it may indeed be that it has never really been articulated. However, the impression that I get from the figures quoted is that the allowance goes beyond compensating for direct marginal costs (particularly bearing in mind that substantial extra expenditure is separately reimbursed), and that also seems more consistent with it being treated as taxable income. But, given the evidential uncertainty, I think I should also say that I believe, albeit with some hesitation, that the payment even of a "marginal-cost-only" allowance would be sufficient. I would make two points.

93. First, the character of the relationship between a foster carer and the fostering service from which they accept placements is *sui generis*. They undertake a highly responsible role, for which they have to undergo a rigorous statutory approval process, in order to enable a local authority to discharge an important statutory obligation. Their responsibilities are continuous as long as the placement lasts and cannot be confined to working hours or put aside in order to take leave. Even if formally the service has to be treated as being provided gratuitously, I do not believe that the position of someone who subjects themselves to those responsibilities can be equated to that of, say, a volunteer in a charity shop (an example advanced by Mr Collins in argument). In this exceptional case I do not believe that the absence of a payment that can be identified specifically as "reward", in the sense of profit, should be treated as definitive of the character of the relationship.

94. Second, that point is, I think, reinforced rather than weakened by the fact that most foster carers do in fact receive remuneration. That seems to me to indicate that the character of the relationship generally is one of a kind which would be understood to involve reward. The fact that, as a result of the parsimony of the particular fostering service or the generosity of the particular carer, no such reward is given does not undermine the nature of the relationship. It would be odd and unsatisfactory if the article 11 rights of foster carers undertaking the same responsibilities within the same statutory framework varied according to the frankly adventitious circumstance of whether or not they were paid an allowance alone or an allowance plus fee.

95. I would accordingly conclude that all foster carers who undertake placements in accordance with the 2011 Regulations should be regarded as being, during a placement[12], in an employment relationship with the fostering service for which they undertake that placement such that article 11 of the Convention is engaged. I should, however, say that even if I were wrong in my conclusion about allowance-only foster

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[12] It is unnecessary to consider what the position is between placements. That might be an important question if we were concerned with ordinary employment rights; but it could not sensibly be argued before us that workers who work intermittently only fall within the scope of article 11 during the period that they are actually working.

carers, that should not be fatal to the Appellants' case as long as my conclusion about fee-paid foster carers is correct. If a trade union has some members who are within the scope of article 11, I do not see how it can make a difference that it may have other members who are not. Thus even in that scenario the NUPFC should in principle be entitled to contend that a refusal to list it is a breach of its article 11 rights (without prejudice of course to the issues of interference and justification considered below).

96. That last point is subject to one complication. Although if the membership of the NUPFC grows it is likely that it will in the longer term consist mainly of fee-paid foster carers (since those constitute the majority), the criterion which the Certification Officer was obliged by the 1992 Act to apply was whether its current membership consisted wholly or mainly of workers. At para. 70 of its judgment the EAT says that there is no evidence that any of "the foster carers who are members of the Appellant" were fee-paid. It appears that it had in mind the fact that the Haringey FCA, which applied to Mr Findlay and Mr Da Silva, refers only to the allowance (and to retainer fees, but these are not relevant for present purposes). But that may not be the whole picture. Taking it as shortly as possible:

    (1) As discussed at para. 54 above, I am not sure that it is a safe conclusion that Haringey does not pay a fee during placements.

    (2) There is express evidence about one of the six officers named on the application form, since Ms Anderson says at para. 6 of her witness statement that Hampshire County Council pays her a fee in addition to the allowance.

    (3) As regards the other three original members, it is arguable that the evidence that the majority of foster carers are fee-paid should be treated as justifying a finding (in the absence of evidence to the contrary) that that was so in their cases.

    This point did not emerge during the hearing, no doubt because none of the parties regarded it as relevant to the issues of principle; and if, as I would hold, there is no relevant distinction between fee-paid and allowance-only foster carers they were right to take that view. For that reason, and since the evidence is so equivocal, I prefer not to express a concluded view about which group constituted the majority at the time of the Certification Officer's decision.

97. Ms Crasnow referred us to the decisions of the CJEU in *R (Payir) v Secretary of State for the Home Department* C-294/06, [2008] ICR 1005, which concerned the worker status of an au pair under the Ankara Agreement; and *Fenoll v Centre d'Aide par le Travail "La Jouvene"* C-316/13, [2016] IRLR 67, which concerned the rights under the Working Time Directive of a disabled person providing services at a work rehabilitation centre. The reasoning and decisions in those cases are broadly supportive of the Appellants' case, but they are a less directly reliable guide than the decisions in the *Good Shepherd* case, which is a decision of the ECtHR, and *Sindicatul Familia Constanța*, which is concerned specifically with foster carers.

98. For those reasons I conclude that article 11 is engaged.

(2) INTERFERENCE

99. The Appellants contend that the denial of a right to be listed interferes with the article 11 rights of the NUPFC and its members in at least two ways. First, and more generally, it denies the union official status. Secondly, and more specifically, it denies them access to the compulsory recognition machinery under Schedule A1.

100. As to the more general interference, Ms Crasnow and Lord Hendy were constrained to accept that the various rights accorded by the 1992 Act to trade unions and to independent trade unions, and their members, did not depend on whether they were listed or had a certificate of independence. But they submitted that that was too formalistic an approach. For all practical purposes listing was the mark of an official status. A trade union could not in reality attract members or expect to be taken seriously by employers unless it were listed. Difficulties could also be raised if there were a challenge about whether it satisfied the conditions for being a trade union under section 1 or for being independent under section 5. No doubt in principle those matters could be proved if necessary, but there are obvious advantages in being able to rely on a certificate under section 2 (5) or section 8 (1). They pointed out that the claim in the *Good Shepherd* case arose out of a refusal to include the union on an official register.

101. I would accept that submission. Mr Cooper was entitled to emphasise that listing is not an absolute requirement for the enjoyment of the rights and protections accorded by the 1992 Act (with the exception of the rights under Schedule A1). But I nevertheless agree with the Appellants that in substance listing is a badge of official status. In particular, whatever the theoretical position, the regulatory regime under Part I of the Act can in practice only be operated in the case of trade unions which appear on the list: if they do not, as Mr Cooper acknowledged, the Certification Officer has no means even of knowing that they exist. The reality is that a trade union which is not listed is liable to find itself seriously inhibited in exercising its core functions.[13]

102. I turn to the rights conferred by Schedule A1. As noted at para. 20 above, a trade union can only apply to the CAC under paragraphs 11 or 12 if it has a certificate of independence, which in turn can only be issued to a union which appears on the list. Thus the denial of listing to NUPFC necessarily means that it will be unable to apply for compulsory recognition. Equally fundamentally, the entire machinery proceeds on the assumption that recognition is being sought in respect of "workers", as defined in section 296 (1).

103. Lord Hendy submitted that that constituted an interference with "the right to bargain collectively with the employer", which was first recognised by the ECtHR in *Demir v Turkey* (2009) 48 EHRR 54 as "one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention" (see para. 154 of the judgment of the Court). There remains some uncertainty about how far the right recognised in *Demir* goes in practice, but Lord Hendy relied on two decisions of this Court which have held that in principle the

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13 It is not clear why the statute does not make listing a formal prerequisite of status as a trade union, as might have been expected. I suspect that the answer is to be found in the controversies originating with the Industrial Relations Act 1971 and the compromises required in its replacement by the Trade Union and Labour Relations Act 1974.

exclusion of a trade union from access to the compulsory recognition procedure under Schedule A1 of the 1992 Act could constitute a breach of it.

104. The first of those decisions is *Pharmacists' Defence Association Union v Boots Management Services Ltd* [2017] EWCA Civ 66, [2017] IRLR 355, ("*Boots*"). In that case the appellant independent trade union ("the PDAU") was seeking access to the compulsory recognition procedure. Paragraph 35 of Schedule A1 precludes an application for recognition where another union is already recognised; and the employer relied on the fact that it had recently recognised (albeit for very limited purposes) a non-independent in-house trade union – a so-called "sweetheart arrangement". The PDAU argued that that state of affairs constituted a breach of its article 11 rights. In my judgment, with which Sir James Munby P and Sales LJ agreed, I analysed the reasoning in *Demir* and – in particular – the subsequent decision of the ECtHR in *Unite the Union v United Kingdom* app. no. 65397/13, [2017] IRLR 438. At para. 47, I said:

> "… [T]he 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 … . 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*."

At para. 54, I said:

> "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, …) – '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."

The principal issue in *Boots* was whether the provisions of Schedule A1 allowed an application to be made for the derecognition of the incumbent union, which would open the way for an application by the PDAU. I concluded that they did. I said at

para. 62 that I reached that conclusion applying ordinary domestic principles of construction, but I added that

> "… if it were necessary I would invoke the special principles applicable under section 3 of the 1998 Act, since if derecognition … were not available there would in my view be a breach of article 11".

That was strictly an *obiter dictum*, but it illustrates the kind of case where denial of access to the Schedule A1 machinery would constitute a breach of article 11 in accordance with my analysis at paras. 47 and 54.

105. The second decision of this Court on which Lord Hendy relied is *Vining v London Borough of Wandsworth* [2017] EWCA Civ 1092, [2018] ICR 499. In that case a statutory provision appeared to exclude parks policemen from the collective redundancy consultation rights under section 188 of the 1992 Act. It was held that that exclusion contravened the article 11 rights of the employees in question and their trade union, and that the statute could be "read down" under section 3 of the 1998 Act in order to avoid that consequence. Paras. 47 and 54 of my judgment in *Boots* were approved at para. 64 of the judgment of the Court (Sir Terence Etherton MR, Beatson LJ and myself). Although the issue in that case concerned compulsory consultation rather than compulsory recognition, and the exclusion operated on the individual worker rather than the trade union, the underlying principles are the same.

106. Since the argument in the present case, the question whether the exclusion of a trade union from access to the compulsory recognition procedure in Schedule A1 could constitute a breach of article 11 rights has been considered again in *R (Independent Workers Union of Great Britain) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWCA Civ 260 ("*IWGB*"). At para. 62 of his judgment, with which Phillips LJ and I agreed, Bean LJ said:

> "I … agree the summary of the Strasbourg case law in Underhill LJ's judgment in *Boots* at [54], and the judgment of this court in *Vining* at [64], that to the extent that the rules of any statutory scheme constrain access to collective bargaining for a particular trade union or its members the constraints will have to be justified by relevant and sufficient reasons, and must strike a fair balance between the competing interests at stake; but that in assessing that justification the choice made by Parliament should be given a wide margin of appreciation."

107. Lord Hendy submitted that on the basis of *Demir*, as interpreted and applied in *Boots* and *Vining*, the exclusion of NUPFC from access to the Schedule A1 machinery would clearly be an interference with its article 11 rights.

108. The equivalent argument was rejected by the EAT. It held at para. 92 that article 11 conferred no "entitlement to request compulsory recognition for the purposes of collective bargaining". It cited in support of that conclusion para. 44 of the judgment of Supperstone J in *IWGB* at first instance ([2019] EWHC 728 (Admin)), where he said:

> "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."

At para. 93 it referred to para. 62 of my judgment in *Boots*. It continued, at para. 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."

109. With respect, I do not think that the EAT's approach recognises the true effect of the decisions in *Boots* and *Vining* (and now *IWGB*). It is correct to say that those decisions do not support the stark proposition that "there is a right under Art 11 to seek compulsory recognition": as Supperstone J says in the passage which the EAT cites, "there is no universal or unqualified right to compulsory recognition". But they are authority for the more modest proposition that, where a statutory scheme of recognition is in place, the exclusion of a trade union from access to that scheme may in certain circumstances be a breach of article 11. It is in such a case no answer to say that the trade union has the right to seek collective bargaining on a voluntary basis.

110. The principal point pursued by Mr Cooper in his oral submissions was not so much a defence of the reasoning of the EAT as a submission that the question simply did not arise in the context of a challenge to a decision under section 2 of the Act. An interference with the right in question would only arise at the point where the NUPFC made an application under paragraph 11 or 12 of Schedule A1 which was rejected because it had no certificate of independence. Treating the refusal to list as an interference in itself was wrong in principle, but it would also lead to the issue of justification being discussed in a vacuum rather than in the context of a substantive interference, which would be extremely unsatisfactory. This is of course the point which I have already trailed at para. 70 above.

111. I do not accept that submission. In my view the fact that the NUPFC is precluded from applying for recognition under Schedule A1 constitutes an interference with its article 11 rights as from the moment of the refusal to list. It cannot be right that in order to establish an interference it should be obliged to make a request for recognition under paragraph 4, to which it knows that it is not entitled (because it has no certificate of independence), and then to make an application under paragraph 11 or 12 which it knows that the CAC will be obliged to refuse. What matters is that it does not enjoy the right to apply.

112. The argument before us, as before the EAT, proceeded on the basis that it was the Certification Officer's refusal to list the NUPFC that denied it the opportunity to seek compulsory recognition. I do not think that that is correct. Even if the NUPFC were

listed, and so potentially qualified for a certificate of independence, it faces the more fundamental difficulty that the statutory scheme is concerned entirely with recognition in respect of "workers", as defined in section 296 (1): by way of illustration only, it would be unable to satisfy the CAC that at least 10% of the workers in the proposed bargaining unit were members, and its application would fail at the first step. However this would appear to be simply another way in which the statutory definition produces the same interference with the NUPFC's article 11 rights, and it raises no distinct issue.

113. I would accordingly hold that the Certification Officer's decision to refuse to list the NUPFC constituted an interference with its article 11 rights in as much as it deprived it of the right to invoke the compulsory recognition procedure under Schedule A1 of the 1992 Act.

114. Lord Hendy sought to put the case more widely. He submitted that, although in form the Certification Officer's decision was only to refuse to include the NUPFC on the list, the reason underlying that decision was that it did not satisfy the definition of a trade union under section 1 at all. So understood, his decision represented a still more fundamental interference with its article 11 rights, since if that were the case it and its members were deprived of the totality of the rights accorded by the 1992 Act.

115. In my view we ought not to approach the issues on that basis. The NUPFC's challenge is and must be to the Certification Officer's actual decision, and it is accordingly necessary for us to consider, as I have above, whether his refusal to list it under section 2 constitutes an interference with its article 11 rights. Whether the application of his interpretation of section 1 to other rights accorded by the 1992 Act would give rise to other interferences with the article 11 rights of the NUPFC or its members, and if so whether such interferences would be justified, can only sensibly be decided in the context of cases where those rights are in issue. This appeal cannot become a roving examination of every situation in which the union or its members may be impacted by the *W* line of authority. To that extent at least I accept the approach urged on us by Mr Cooper.

(3) JUSTIFICATION

Introduction

116. It follows from the foregoing that the interference with article 11 rights which has to be justified is the exclusion of a trade union comprising wholly or mainly foster carers without a contract from the right to be listed, with the consequence both that it is excluded from the right to access the compulsory recognition procedure and, more generally, that it has no "official status".

117. Since the EAT had found that there was no interference with the article 11 rights of the NUPFC or its members it was not obliged to consider the issue of justification. However it did so in case it was wrong. It defined the relevant interference in essentially the same terms as I have done above, and concluded that any interference was justified. Since the restriction of the right to be listed to trade unions mainly comprising workers (as defined by section 296 (1)) was plainly "prescribed by law" the issue was whether it was "necessary in a democratic society" within the meaning of article 11 (2) as glossed in the well-known case-law on justification. It considered

in turn whether the restriction pursued a legitimate aim and, if so, whether it was a proportionate means of achieving that aim. It reminded itself at paras. 103-109 that the law relating to trade union rights, and in particular the extent to which trade unions should be accorded the right to seek compulsory collective bargaining, was an area in which member states were to be accorded a particularly wide margin of appreciation, citing *inter alia* para. 54 of my judgment in *Boots* and the passage from the judgment of the ECtHR in *Unite the Union* on which it was primarily based.

118. Like the EAT I will consider separately (a) whether the exclusion of a trade union comprising wholly or mainly foster carers without a contract from the right to be listed had a legitimate aim and (b), if so, whether it was a proportionate means of achieving that aim. That is the orthodox approach, although there can be (and is here) a good deal of overlap between the two questions.

(a) Legitimate aim

119. The Respondents submitted in the EAT that the restriction with which we are concerned had two legitimate aims, defined by the EAT at para. 114 of its judgment as (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" – to whom I will refer as "workers with/without a contract"[14]; and (ii) "protecting the rights and wellbeing of children in foster care". I take them in turn.

120. The EAT considered the first aim at paras. 115-117. I need to quote the passage in full:

> "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. The nature of that contract (i.e. 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

[14] This is arguably not quite apt since if the Respondents are right a worker without a contract is not a worker in the first place; but it will do as a shorthand.

> 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.
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> 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."

121. It is necessary to unpack that reasoning with some care. The primary conclusion that the aim in question is legitimate is at the end of para. 115: paras. 116 and 117 are dependent on that conclusion. What the EAT says is that it is within the UK's margin of appreciation to limit trade union rights in general, and the right of access to compulsory collective bargaining in particular, by reference to a criterion of whether the members of the union provide their services under a contract. I do not think, however, that it gives a sound basis for that conclusion. It begins with the point that member states are in principle entitled "to draw distinctions between different groups in relation to trade union rights"[15]; and it says that Parliament has in the present case provided for a distinction between those working under a contract and those who are not. So far so good, but that only gets us to first base: the crucial question is whether that particular distinction pursues a legitimate aim. The only answer apparently advanced to that question is that, since British employment law distinguishes between different kinds of contract in determining the extent of the individual employment rights enjoyed by workers, it must be legitimate to exclude trade union rights for

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[15] The case of *Manole* to which the EAT refers is authority for that general proposition, but it does not advance the argument otherwise. The application was made by an association of self-employed farmers who had been denied the right to register as a trade union. The ECtHR held that that involved no breach of article 11: the farmers came within the scope of the article, but it was justified to deny them the right to associate in the specific form of a trade union. That is hardly surprising since they were not in an employment relationship, but the facts are a long way from those of the present case.

workers who do not work under a contract at all: see the antepenultimate and penultimate sentences of para. 115. With respect, that seems to me to be a *non sequitur*. At this stage of the argument we are proceeding on the basis that workers without a contract are in an employment relationship just as much as workers with a contract. The fact that in the case of the latter the statutory definition distinguishes between different kinds of contract cannot be an answer to the question why the former are excluded altogether. If it is justifiable to have higher ("employee") and lower ("worker") levels of employment protection, as the British system does, there is no reason why that distinction could not be provided for in the case of workers without a contract.

122. In short, I do not believe that the EAT has identified a legitimate aim for maintaining a distinction in this context between workers with and without a contract.

123. That conclusion means that para. 116 of the EAT's judgment is strictly irrelevant, because it addresses a question – "rational connection" – which only arises if a legitimate aim has been established. But there is a risk of being over-analytical, and it may be that the EAT's reasoning in that paragraph feeds back into the prior question. I should therefore say that I do not find it persuasive. Of course, where a worker works under a contract, pay, hours and holidays will constitute terms of the contract, and any collective bargaining – whether voluntary or as a result of compulsory recognition under Schedule A1 – will typically be directed at agreeing changes to those terms. But it does not follow that where they work under a non-contractual arrangement there is no scope for collective bargaining. Despite being non-contractual, the arrangement will still provide for pay, hours and holidays, and there is no reason why changes to them cannot be the subject of negotiation. The facts of the present case are unusual because of the difficulty of accommodating the concept of hours and holidays to the role of a foster carer[16], but that does not affect the principle. And even in the present case there is plainly scope for negotiation about remuneration. The amount of the fees paid by fostering services to their carers is entirely within its discretion (and even the allowance prescribed by the Government is only a minimum). There is no reason why the NUPFC, or indeed the GMB or the IWGB, should not seek to negotiate better rates with particular local authorities or fostering agencies; and that would be negotiation about pay. Such negotiation would constitute collective bargaining within the meaning of Schedule A1: see para. 20 above. In this connection Mr Collins referred us to *Redcar and Cleveland Borough Council v Others ("Re B")* [2013] EWCA Civ 964, in which it was held that a refusal by a local authority to pay fostering allowance to a foster carer could only be pursued by way of judicial review (see para. 6 of the judgment of Black LJ)[17]; but it does not follow from the fact that a foster carer cannot bring a contractual claim for unpaid allowance or fees that they cannot be the subject of collective bargaining.

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16 Ms Anderson says at para. 29 of her witness statement that Hampshire County Council gives her a form of holiday by arranging for two weeks' "respite care" for the children who she looks after. But Ms James at para. 20 of her witness statement in response says that this is "a matter of dispute in the Employment Tribunal case which Ms Anderson has brought against HCC". We have no further details.

17 He also referred, to similar effect, to *R (SA) v Kent County Council* [2011] EWCA Civ 1303.

124. As I understand it, para. 117 does not add anything to the essential reasoning: it simply applies the EAT's conclusion in paras. 115-116 to the particular case before it.

125. In the course of oral submissions the possibility was canvassed whether the application of the distinction between workers with and without a contract could be justified on the basis that it was legitimate for Parliament to wish to employ a common conceptual basis for the definitions of "employee" and "worker" (and their cognates) adopted in British employment legislation. The definitions employed in the multifarious statutes and statutory instruments in this field are in fact far from uniformly worded[18], but it is a requirement of all of them that the employee or worker provides his or her services under a contract. The argument would be that it conduces to the simplicity and clarity of the law if legislation in the same field employs the same essential elements. This is not, I think, the way that the EAT understood the aim which it was considering in para. 115, but there is an echo of it in the language of "*maintaining* the distinction adopted by the legislation" and it makes a rather similar point at para. 126 of its judgment, which I set out below.

126. In my view the use of a common definition of that kind, or a common element in a series of definitions, would in principle be capable of being a legitimate aim which might justify an interference with Convention rights. But it must depend on the particular case. In considering whether it would do so in the present case – whether in the context of the legitimacy of the aim or in striking the proportionality balance – the first question would be what purpose is served by the "contract requirement" in other parts of the employment legislation: the maintenance of that distinction in the present context, in the interests of a common definition, could only be justified if it served an important purpose in employment law generally. That would open up potentially wide-ranging issues on which we were not addressed.[19] Fortunately, as will appear, we need not embark on that enquiry.

127. I turn to the second aim relied on by the Respondents, "protecting the rights and wellbeing of children in foster care". That is addressed by the EAT at paras. 118-122 of its judgment. The aim as so expressed is extremely general, but the underlying point is more specific. Mr Collins' submission was that treating foster carers as workers was liable to have a serious adverse impact on the way that children in their care perceived their relationship: it "[risked] turning the home environment, in which the parental relationship between foster carer and looked after child is developed, into a workplace" (see para. 119). That submission was based on the evidence which I have reviewed at paras. 59-61 above, parts of which the EAT quotes.

128. Lord Hendy's response was that simply allowing a foster carers' union to be listed could have no such impact. Many foster carers already belonged to other listed trade unions like the GMB and the IWGB, and it was not suggested that that had an adverse impact on the wellbeing of the children looked after by them. As part of that submission he emphasised that reading down the definitions in sections 1 and 296 (1)

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[18] Most of the provisions in question are identified in para. 129 of the judgment of this Court in *Gilham v Ministry of Justice* [2017] EWCA Civ 2220, [2018] ICR 827.

[19] Any such enquiry would involve establishing the legislative origins of the distinction. It certainly goes back to the Industrial Relations Act 1971 (see section 167), but I do not know if it can be traced back further.

in order to allow a foster carers' union to be listed "would not confer on foster carers all of the other rights available to workers under [the 1992 Act] and other legislation" (cf. paras. 68-69 above). The EAT accepted that that was "probably right": see para. 121. But it did not believe that it answered Mr Collins' point. It said (at para. 120):

> "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 [my emphasis]."

129. The EAT acknowledged at para. 121 that some people believed that recognition of worker status for foster carers, either in the trade union context or more generally, might positively benefit looked after children. It said that it could not reach a concluded view about that. But it regarded the evidence of Ms Willison and Ms Burlington, read with the recommendations of the Narey report, as "weighty", notwithstanding ECRU's complaint that no best interests assessment had been performed. It concluded, at para. 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."

130. I agree with the EAT that the concerns expressed in the Narey report, and endorsed in the Department's response, about the impact that foster carers acquiring individual employment rights would have on the nature of the fostering relationship carry great weight. It is clear from the evidence that it is of fundamental importance that children in foster care should experience their relationship with their carers as quasi-parental and that they should not feel that they are simply being looked after as a job. It follows that it is, to put it no higher, legitimate for the state to seek to avoid undermining the familial nature of the relationship when taking measures that affect foster carers. However, I am not persuaded that those concerns apply in the same way to the question whether foster carers should be entitled to have their own trade union, which is a very different matter. As noted at para. 62 above, that is not an aspect on which the Narey report expressed any view, but Ms Willison confronts it at para. 50 of her witness statement. She contends that "the same basic principles" are engaged in either case. She gives two reasons, which I take in turn.

131. First, she refers to the rights of individual trade union members under the 1992 Act to take time off for trade union activity or to take industrial action[20]. I agree that neither right would sit well with the nature of a foster carer's responsibilities. But, as the Appellants emphasise, they are not in these proceedings claiming any such right and it would not follow from a decision in their favour on the issue of the right of the

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[20] Strictly, the 1992 Act does not confer any right to take industrial action, but of course the various immunities, not only for the worker but for any trade union organising such action, will in principle make it more likely.

NUPFC to be listed; and the EAT accepted this, albeit only "probably" (see para. 128 above). In my view it is not only probable but the case. If we were to conclude that the denial to the NUPFC of the right to be listed under section 2 was a breach of article 11 it would not follow that the absence of a right to take time off for trade union activity, or of any immunity against the consequences of taking, or organising, industrial action, was likewise a breach. Those questions would have to be resolved if the issue ever arose in practice (which might be thought rather unlikely). If it did, there would be serious issues not only about justification but also about whether there was any interference with the article 11 right in the first place.

132. Second, Ms Willison refers to the "message" which the recognition of trade union rights would send to children in foster care. This is the point that the EAT accepted (see para. 128 above), but I find it rather unpersuasive. No doubt, if the NUPFC is listed and begins to recruit, an older child whose carers become members may become aware of that fact, and perhaps also (if in due course this happens) that the union is representing them in negotiations for better remuneration. But I find it hard to believe that knowledge of that kind is likely to undermine the child's perception of the nature of the fostering relationship. Quite apart from anything else, any child who understands that much will certainly be aware that their carer receives money for looking after them. If that knowledge does not undermine the relationship, knowledge that the carer belongs to a trade union is not very likely to do so. It is true that as a matter of legal analysis such a right would derive from the foster carer being treated, at least for article 11 purposes, as a "worker" and as being in an "employment relationship", which I take to be the point that the EAT is making at para. 120; but it is hard to see how those abstractions would impact on a child. My view is reinforced by the fact that trade unions may already include foster carers as members and represent them (albeit that they cannot seek compulsory collective bargaining in so far as they are not workers), and that a significant number of foster carers already belong to the GMB and the IWGB: as Lord Hendy says, there is no evidence that this has led to any damage to the relationships of the carers in question with the children whom they are fostering.

133. In short, I quite accept that it is legitimate for Parliament, and the Government, to wish to avoid the risk that the grant of "worker status" to foster carers will damage the nature of the fostering relationship. But that aim does not have the same weight where the right sought consists only of the right for a trade union comprising only foster carers to be listed and (in consequence) to seek recognition for collective bargaining purposes under Schedule A1 and does not include any individual rights that would directly impinge on the fostering relationship.

134. Before I leave this aspect, I should note that this second "legitimate aim" is in one sense artificial. The exclusion of foster carers from the scope of the 1992 Act (and of the legislation conferring individual employment rights) is not the result of any concern of the kinds expressed in the Narey report, and in a causal or historical sense they cannot be said to be part of its "aim". Rather, it is the result of a general choice made in 1971 (if not before) about the definition of "worker" without, we may be sure, any specific consideration of the position of foster carers; it is to that extent purely accidental. It is of course well-recognised in the context of Convention rights that a measure may be justified by reference to considerations which were not

originally contemplated or articulated. But it is important nevertheless because it means that in questioning the weight to be attached to the two points advanced by Ms Willison I am not questioning a policy choice made by Parliament: there has never been any legislative assessment of the issue of whether foster carers should enjoy trade union rights.

(b) Proportionality

135. The EAT considers the issue of proportionality at paras. 123-127 of its judgment. At para. 123 it summarises the well-known four-fold analysis suggested by Lord Reed in *Bank Mellat v HM Treasury (no 2)* [2013] UKSC 39, [2014] AC 700. At para. 124 it says that it follows from its conclusions as regards legitimate aim that "the measure in question is rationally connected to sufficiently important objectives". It continues:

> "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;
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> b. form their own trade unions;
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> c. join other trade unions with or without listed status (although in the former, they could not form a majority of the union);
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> 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.
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> 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][21]. As stated there:
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> > '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

[21] The reference is to the decision of this Court – see n. 18 above – not the later decision of the Supreme Court.

> 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."

136. I respectfully differ from the EAT's assessment of the extent of the interference with the rights of the NUPFC and its members which its exclusion from listing entails. I do not accept that that interference can properly be described as "fairly minimal" (para. 126), still less "minimal" (para. 127). The fact that foster carers can still enjoy the various rights enumerated at para. 125 is no substitute for the right to form and join a trade union with the official status that listing under section 2 would bestow. Nor is the opportunity to seek collective bargaining arrangements on a voluntary basis a substitute for the right to seek compulsory recognition. Although it is true that many employers do engage in collective bargaining on a voluntary basis, the fact that the union has the right to pursue compulsory recognition is a powerful incentive; and indeed Schedule A1 is structured in such a way as to encourage unions and employers to reach agreement without pursuing the statutory machinery to the final stage.

137. I appreciate that the effect of the interference is mitigated by the fact that, as the EAT says at para. 125 (c), foster carers can join a listed trade union, and thus acquire the consequent rights and protections, provided that they do not form the majority of the membership of that union. But it remains a significant interference that they are not able to join a trade union of their choice, and, more specifically, one dedicated wholly or mainly to their interests.

138. I do not believe that the aims relied on by the Respondents are capable of outweighing that significant interference. The ground has been laid for that conclusion by what I have said about those aims above, but I should draw the threads together in the context of the proportionality assessment.

139. As regards 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", I have concluded that the Respondents have not shown any legitimate purpose for that distinction in the context of the trade union rights with which we are here concerned. I have acknowledged that there is some value in employing a definition of worker which is common throughout the employment field (or in any event uses the same

concepts). But even assuming (though this has not been shown) that the distinction between workers with and without a contract is legitimate in the context of individual employment rights, I cannot see that the theoretical desirability of employing common concepts can justify precluding a trade union from being listed or employing the compulsory recognition procedure, on the basis only that it is comprised mostly of workers without a contract.

140. As regards "protecting the rights and wellbeing of children in foster care", I do not believe that the evidence shows that allowing foster carers to form and join a trade union of which they form the majority membership will have any real impact on the nature of the fostering relationship. In my view it is fairly clear that the Secretary of State is concerned not so much about the actual issue raised by the NUPFC's claim as by the risk of it representing the thin end of the wedge in forcing open the door to full worker (or indeed employee) status. I do not believe that it does so. That door is still barred by the decisions in *W v Essex County Council* and *Rowlands* (unless and until reconsidered by the Supreme Court, in which case the Secretary of State will have a much bigger problem), and the wedge opens a crack no bigger than the effect of Convention rights requires.

141. I should repeat in the context of the proportionality question the point made at para. 134 above.

Conclusion

142. For those reasons I believe that if the effect of the definitions in section 1 and 296 (1) is that the NUPFC is excluded from the right to be listed under section 2 of the 1992 Act there will be a breach of its rights under article 11 of the Convention.

(4) READING DOWN

143. Section 3 (1) of the 1998 Act provides that:

> "So far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with the Convention rights."

I need not recapitulate the well-known case-law about the extent of that power, because in *Gilham v Ministry of Justice* [2019] UKSC 44, [2019] ICR 1655, the Supreme Court applied it in circumstances that were substantially identical to those of the present case.

144. The claimant in *Gilham* was a judge, who claimed compensation for whistleblower detriment under Parts IVA and V of the Employment Rights Act 1996. The statute accords the rights in question to "workers". As already noted, "worker" is defined in section 230 (3) of the Act in terms that are for present purposes identical to section 296 (1) of the 1992 Act. The Court held that the denial of the right to bring a whistleblower claim was a breach of article 14 (taken with article 10) of the Convention. It went on to hold that it was possible to read down the statutory definition "so that it extended to an 'employment relationship' of the kind found to exist in *O'Brien*": see paras. 42-43 in the judgment of Lady Hale, approving the view taken by this Court.

145. As noted at para. 81 above, the language of "employment relationship" in *O'Brien* derived from the Part-Time Workers Directive, but it plainly has the same meaning as in *The Good Shepherd*. If, therefore, as I would hold, foster carers are in an employment relationship for the purpose of article 11, it must follow that the term "worker" in section 296 (1) can equally be read down so as to include them notwithstanding that they do not work under a contract. Importantly, Lady Hale emphasised in para. 42 that

> "… the interpretation in this case would only relate to an exclusion which is incompatible with the Convention rights – otherwise the section 3 (1) power and duty does not apply."

That confirms, as the Appellants have contended throughout, that the effect of the reading down would not be to require foster carers to be treated as workers for the purpose of the 1992 Act generally, still less for the purpose of any other legislation in the employment field. It applies only to the extent necessary to give effect to their Convention rights.

(B) ARTICLE 14

146. The conclusion that I have reached about the claim under article 11 means that it is unnecessary to consider whether the NUPFC's exclusion from the right to be listed would also constitute a breach of its rights under article 14. We heard a good deal of argument about whether the fact that a worker has or does not have a contract constitutes a "status" within the meaning of the article, but it is unnecessary to further lengthen this judgment by exploring the vexed jurisprudence in this area.

DISPOSAL

147. I accordingly believe that the Court should allow the appeal and make a declaration that for the purpose of section 1 of the Trade Union and Labour Relations (Consolidation) Act 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. I make four observations about the formulation of that declaration and its effect.

148. First, the practical effect is that the Certification Officer is very likely now to be obliged to enter the NUPFC on the list maintained under section 2. But I do not think that it would be right for us to make a positive declaration to that effect, because we should not assume that it meets the other requirements for entry on the list.

149. Second, I have treated the recognition of foster carers as workers for the purpose of the extended definition as depending on them being party to an FCA. That means that there is a clear way of defining who does and does not fall within its terms. (One consequence of this definition is that it is immaterial for the purpose of section 2 whether the majority of the members of the union have a child placed with them at the date of the Certification Officer's decision: cf. n. 12 above.)

150. Third, the declaration applies the extended definition of "worker" only for the purpose of sections 2-4. Although it would follow from my reasoning that it will also apply (a) for the purpose of sections 5-8 and (b) for the purpose of Schedule A1, I do not think that it would be right to refer to those provisions in the declaration because no application under section 6 has been made, and still less has the NUPFC sought to initiate the compulsory recognition procedure.

151. Fourth, I also believe that the extended definition must apply for the purpose of the regulatory and supervisory provisions contained in the other Chapters of Part 1. If the effect of article 11 is that the NUPFC should be treated as a trade union for the purpose of enjoying the benefit of the "official status" which in practice goes with entry on the list, then that benefit must come with the burden of being treated as a trade union for the purpose of those provisions. I do not suppose the NUPFC expected anything different, but it is important to make the point explicit so that the Certification Officer, who is responsible for the enforcement of those provisions, knows where he stands. Again, I have not included this in the declaration, not only because the question is not formally before us but also because we were not taken through the details, and there may possibly be some particular provisions which are not caught by this approach.

152. I would make one final observation. Despite what I have said about the effect of this decision being limited to trade union rights, and only those which are protected by article 11, it will be appreciated that the exclusion of foster carers from employment rights more generally is dependent on *W v Essex County Council* and the cases following it. That line of authorities turns entirely on the question whether the relationship between foster carers and the fostering services is to be characterised in law as contractual: that is a binary legal question and takes no account of the peculiarity of the role itself. If they were to be overturned by the Supreme Court it seems that full worker or employee status would necessarily follow notwithstanding the Secretary of State's strong view that this was undesirable. I express no view about the likelihood of that occurring, but I note what Bean LJ says in his judgment; and the decision of the EAT in *Glasgow City Council v Johnstone* shows how thin the relevant distinctions may be. 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.

Lord Justice Bean:

153. For the reasons given by the Vice-President in his clear and comprehensive judgment, with which I agree, I too would allow the appeal and make the declaration which he proposes.

154. The complexity of the issues in this case derives in no small measure from *W v Essex County Council* [1999] Fam 90. As has already been noted, in paragraph 50 of his judgment Stuart-Smith LJ (with whom Judge and Mantell LJJ agreed) held that there was no contract between the local authority and foster carers, saying:

> "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."

155. This is puzzling. There are other types of work, such as teaching and nursing, where pay and conditions are determined nationally pursuant to statutory powers and cannot be varied by the parties. The Divisional Court decision in *Norweb v Dixon* concerned the nature of the relationship between electricity supplier and customer, which is an entirely different topic. The doctrine of precedent means that we are bound by *W v Essex*, as this court and all lower courts and tribunals have been for more than 20 years since it was decided. But I respectfully suggest that it may require reconsideration, either by the Supreme Court or by Parliament.

Green LJ:

156. I agree with both judgments.