Neutral Citation Number: [2017] EWCA Civ 1092

Case No: A2/2016/0201

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
MRS JUSTICE SLADE
[2015] UKEAT 0234

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2017

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE BEATSON
and
LORD JUSTICE UNDERHILL

- -

Between:

(1) MAURICE VINING **(2) STEPHEN FRANCIS** **(3) UNISON**	**Appellants**
- and -	
LONDON BOROUGH OF WANDSWORTH	**Respondent**
-and-	
THE SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS	**Interested Party**

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Betsan Criddle (instructed by **Unison Legal Services**) for the **Appellants**
Edward Capewell (instructed by **Sharpe Pritchard**) for the **Respondent**
Daniel Stilitz QC and Mathew Purchase (instructed by **Government Legal Department**) for the **Interested Party**

Hearing dates: 14 – 15 June 2017

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Approved Judgment

Sir Terence Etherton MR:

1. This is the judgment of the court, to which all the members have contributed.

I. OVERVIEW

2. This appeal is about the rights of members of local authority parks police forces and of their trade unions. Can they bring claims for "ordinary" unfair dismissal and can their trade unions bring claims for a protective award in respect an alleged failure in collective consultation? In a decision made on 23 January 2013 an employment tribunal held that they could, but in a decision made on 21 December 2015 Slade J, in the Employment Appeal Tribunal ("the EAT"), held that they could not. She allowed an appeal by Wandsworth London Borough Council ("Wandsworth"), the respondent to this appeal. The first two appellants are Maurice Vining and Stephen Francis, who were formerly members of Wandsworth's parks police force. The third appellant is their trade union, UNISON. The Secretary of State for Business Innovation and Skills ("the Secretary of State") is an interested party.

3. The procedural history of this case has been complicated by a decision of this court on the point handed down after the decision of the employment tribunal but before that of the EAT. On 7 June 2013, in *London Borough of Redbridge* v *Dhinsa and McKinnon* [2014] EWCA Civ 178, [2014] ICR 834 ("*Redbridge*") this court decided that members of local authority park police forces are employed in "police service" and thus prevented by section 200 of the Employment Rights Act 1996 ("the 1996 Act") from pursuing claims for unfair dismissal. It did so as a matter of domestic law. The impact of the Human Rights Act 1998 and the European Convention of Human Rights ("the ECHR") was not before the court.

4. The appellants' written submissions argued that the *Redbridge* case was decided *per incuriam*. That argument is misconceived for the reasons given at para. 21 below. The impact of the rights under the ECHR on the domestic legislation was the central issue in the EAT and is at the core of this appeal. The first of the two questions before this court is the impact of the right under ECHR article 8 to respect for private life, either on its own or in conjunction with the protection from discrimination given by ECHR article 14, on section 200 of the 1996 Act. The second, and closely related, question is the impact of the right under ECHR article 11 to freedom of association on section 280 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"), which likewise excludes employees in "police service" and their representatives from the redundancy consultation rights conferred by that Act.[1]

5. The remainder of this judgment is organised as follows. Part II sets out or summarises the relevant domestic legislation. Articles 8, 11 and 14 of the ECHR are set out in an appendix. Part III contains the factual and procedural background. Parts IV and V summarise the judgment of the EAT and the grounds of appeal. Part VI contains the analysis and conclusions on the substantive issues before the court. Part VII deals with the disposal of the appeal in the light of those conclusions.

II. THE LEGISLATIVE FRAMEWORK

[1] The provisions of the 1992 and 1996 Acts are set out at paras. 7-8 below.

6. The provisions of articles 8 and 11 of the ECHR are in the Appendix to this judgment.

7. *Unfair dismissal.* Part X of the 1996 Act gives employees the right not to be unfairly dismissed. But section 200, in the section of Part XIII of the Act dealing with "excluded classes of employment", provides:

> "*Police officers*
>
> (1) Sections 8 to 10, Part III , sections 43M, 45, 45A, 47, 47C, 50, 57B and 61 to 63, Parts VII and VIII, sections 92 and 93, and Part X (except sections 100, 103A and 134A and the other provisions of that Part so far as relating to the right not to be unfairly dismissed in a case where the dismissal is unfair by virtue of section 100 or 103A) do not apply to employment under a contract of employment in police service or to persons engaged in such employment.
>
> (2) In subsection (1) 'police service' means—
>
> (a) service as a member of a constabulary maintained by virtue of an enactment, or
>
> (b) subject to section 126 of the Criminal Justice and Public Order Act 1994 (prison staff not to be regarded as in police service), service in any other capacity by virtue of which a person has the powers or privileges of a constable."

8. *Redundancy consultation.* Section 188 of the 1992 Act imposes a duty on an employer who is proposing to dismiss as redundant 20 or more employees within a period of 90 days or less to consult appropriate representatives of any of the employees. Typically, the "appropriate representative" will be a recognised trade union, and for simplicity we will refer simply to that situation. Sub-section (2) provides:

> "The consultation shall include consultation about ways of -
>
> (a) avoiding the dismissals,
>
> (b) reducing the numbers of employees to be dismissed, and
>
> (c) mitigating the consequences of the dismissals, and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives."

Sections 189-192 contain provisions under which a trade union may bring proceedings in the employment tribunal for breach of that duty and for the making of a "protective award" payable to employees in respect of whom it had been entitled to be consulted. However section 280 provides:

> "*Police service*
>
> (1) In this Act 'employee' or 'worker' does not include a person in police service; and the provisions of sections 137 and 138 (rights in

> relation to trade union membership: access to employment) do not apply in relation to police service.
>
> (2) 'Police service' means service as a member of any constabulary maintained by virtue of an enactment, or in any other capacity by virtue of which a person has the powers or privileges of a constable."

The effect of excluding persons in police service from the definitions of "worker" and "employee" is that the provisions of sections 188-192 of the Act have no application to the proposed redundancies of such persons; and they and their representatives enjoy none of the rights there accorded.

9. *Parks police.* The Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967 made provision to secure greater uniformity in the law relating to parks and open spaces in Greater London. Section 1 of the Act stated that the Order in Schedule 1 to it should have full force. Article 18 of that Order provides:

> "A local authority may procure officers appointed by them for securing the observance of the provisions of all enactments relating to open spaces under their control or management and of the bylaws and Regulations made there under to be sworn in as constables for that purpose but any such officer shall not act as a constable unless in uniform or provided with a warrant …".

There is an almost identical provision in section 77 of the Public Health Acts Amendment Act 1907, which appears to be applicable outside Greater London.

10. Parts 5 and 6 of Jackson LJ's judgment in the *Redbridge* case contain a full discussion of the office of constable and the statutory and common law basis for the powers of those who are sworn in as constables under the 1967 Act and the position of constables in park police forces. It is not necessary to reproduce or summarise them here, save to state that members of the parks police forces look and act like members of a police force but their jurisdiction is confined to the parks and open spaces and they do not have power to enforce the law generally. Jackson LJ's judgment also referred (at paras. 68-69) to the position of members of what he referred to as "the police forces". Members of forces such as the Metropolitan Police, county constabularies, the British Transport Police, the Ministry of Defence Police, and the Civil Nuclear Police have "elaborate remedies" which provide alternative protection to the unfair dismissal provisions in the 1996 Act. We add that members of those forces are members of either the Police Federation, the British Transport Police Federation, the Defence Police Federation, or the Civil Nuclear Police Federation. Those Federations are able to represent the interests of members of the forces in dealings with the official side; i.e. the police forces.

III. THE FACTUAL AND PROCEDURAL BACKGROUND

11. Because the issue was dealt with as a preliminary issue by the employment tribunal, neither the Employment Appeal Tribunal nor this court has the benefit of findings of fact by the Employment Tribunal. The questions before the court have to be treated in an analogous way to the way pleaded facts are treated when a court considers an

application to strike-out a claim, and, as Ms Betsan Criddle stated on behalf of the appellants, on the assumption that the factual cases contained in the two ET1s will be made out. In circumstances where there are no findings of fact, and a matter is disputed, we cannot proceed on any other basis. For instance, in relation to article 8, Ms Criddle invited us to proceed on the basis that the consequences alleged as a result of the dismissal of Messrs Vining and Francis occurred (see para. 42 below). But this is disputed and there is no finding that those consequences did occur. In relation to article 11, Mr Edward Capewell on behalf of Wandsworth and Mr Daniel Stilitz QC on behalf of the Secretary of State invited us to proceed on the basis that on the facts there was no interference with article 11. Mr Stilitz stated that there is "no doubt" that the "extensive negotiations" with UNISON went well beyond what is required by article 11. But that is disputed. In both cases, if in principle the pleaded facts are capable of engaging article 8 or article 11, or of making those provisions applicable for the purposes of article 14 the right course would be to remit the case to the Employment Tribunal to make a decision on the factual issues in dispute.

12. Messrs Vining and Francis ("the employees") were employed by Wandsworth as Parks Constables in the Leisure and Amenity Services Department between April 1986 and 3 March 2012. On 23 December 2011, when they were aged 53 and 60 respectively, they were told that they were dismissed on the ground of redundancy because of a reorganisation of the parks police service. They received statutory and enhanced contractual redundancy payments. The decision followed a review by Wandsworth of the Parks Police Service in 2010 and 2011 and an eventual decision by Wandsworth to disband the service and to arrange for the Metropolitan Police to police its parks and open spaces.

13. On 27 June 2012 the employees brought unfair dismissal proceedings. On 29 June 2012 UNISON, which was the recognised union as regards parks police employed by Wandsworth, brought proceedings seeking protective awards for failure to comply with the consultation requirements under section 188 of the 1992 Act.

14. Wandsworth's case in its ET3 is that the proposal which led to the redundancies came from the Metropolitan Police Force in March 2011, and that there were meetings about this with staff and their representatives in May, on 26 October, and on 3 and 9 November. As we have stated, this is disputed. UNISON claims that the real decision was taken before 7 December and that what occurred then was only a formal ratification of an earlier decision. In its ET1 UNISON stated that the first meeting that could be described as being held for the purposes of collective consultation took place on 14 December 2011.

15. Wandsworth also raised by way of defence that the employees were precluded from bringing a claim for unfair dismissal by section 200 of the 1996 Act and the union was precluded from bringing its claim by section 280 of the 1992 Act. As noted, the employment tribunal treated these as preliminary issues and held that Wandsworth could not rely on these statutory provisions. Wandsworth appealed and the case was listed for hearing, but, as we have also noted, before the hearing, on 7 June 2013, the *Redbridge* case was decided, and the appeal was stayed pending the appeal in the *Redbridge* case to the Court of Appeal.

16. At a hearing on 14 November 2014 HHJ Peter Clark gave the employees and UNISON permission to amend their answer to Wandsworth's appeal to allow points

based on the law of the European Union ("EU") and the ECHR to be taken for the first time. He stated (at para. 7 of his judgment) that he was satisfied that the amendments were not raised because of any tactical decision. The *Redbridge* case had left open the question whether the exclusion of the rights sought to be enforced meant that the employees and their union had no effective domestic remedy in the light of their EU and ECHR rights. He also stated (at para. 9) that if he refused the amendments the employees and UNISON would have no remedy; if he allowed them Wandsworth would face a different case to that which it faced in the tribunal; but "no further evidential enquiry is necessary for the purposes of the amendments".

IV. THE JUDGMENT OF THE EAT

17. It was accepted before the judge that she was bound by the *Redbridge* case as far as domestic UK law is concerned, and she so held. She then considered whether section 200 of the 1996 Act and section 280 of the 1992 Act were in breach of articles 8, 11 and 14 of the ECHR and concluded that they were not.

18. The judge held (at para. 33) that the dismissals themselves did not engage article 8 because "it was not suggested that [the] selection [of the employees] for redundancy was made for any reason which would affect their reputation, their private or professional relationships" and "[r]edundancy can be regarded as perhaps the least blameworthy reason for dismissal". She stated (at para. 40) that the submission on behalf of the employees that their occupation as parks police constables of itself constituted "other status" for the purpose of article 14 was not supported by domestic authority nor that of the ECHR.

19. As to article 11, the judge stated (at para. 43) that "collective bargaining over employees' interests would fall within the ambit of article 11", and that "loss of employment through redundancy affects employees' interests". She relied on the decision of the ECrtHR in *Demir v Turkey* (2009) 48 EHRR 54 which stated (at para. 145) that article 11 covered the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members. She also stated (at para. 44) that the state has chosen consultation under section 188 of the 1992 Act as the means of trade unions protecting employees' interests in a redundancy situation and that, unlike representation of other local authority employees, the appellants have been deprived of that right. Her conclusion (at para. 44) was that "[a]ccordingly, subject to article 11.2, in my judgment article 11 taken together with article 14 is engaged by the claims for protective awards". The court was not, however, (see para. 47) in a position to express a view on the proportionality of the apparent exclusion by section 280 of the 1992 Act of trade unions such as UNISON representing employees who were members of parks police services from the right to claim a declaration and a protective award under section 189 of the 1992 Act. This was because the Secretary of State had not at that time been joined to the proceedings and there was no evidence or submission on the proportionality of any interference by section 280 of the 1992 Act with the article 11 rights of trade unions such as UNISON to represent employees who were members of parks police services.

20. The judge gave UNISON permission to appeal against her decision on the compatibility of section 280 of the 1992 Act with ECHR article 11 and 14. On 14 March 2016 Elias LJ gave permission to the Secretary of State to be added as a party

to the appeal. He refused permission to appeal on the article 8 grounds, but, following a hearing on 21 July 2016, Longmore LJ gave permission on those grounds.

V. THE GROUNDS OF APPEAL

21. Ground 1 is that as a matter of domestic law the *Redbridge* case should not be followed because it was *per incuriam*, as the court did not address the ECHR issues. This was not pursued at the hearing. Ms Criddle recognised that, since this ground is that the *Redbridge* decision should not be followed because the court did not address the ECHR questions which are central to the present appeal, it does not in substance add anything to grounds 2 and 3. She was correct to concede this point. The fact that the *Redbridge* case did not refer to the ECHR questions does not render its decision *per incuriam* on the issues which it in fact decided in relation to the domestic construction of the statutory provisions.

22. Ground 2 is that the judge erred in concluding that article 8 of the ECHR was not engaged and that, if she was correct about the interpretation of the domestic provisions, there was no breach of the ECHR. It was submitted that she should have found that the dismissals of the employees were discriminatory and in breach of article 14 and that section 200 of the 1996 Act could be interpreted in such a way as to be compatible with the ECHR.

23. Ground 3 is that, while the judge was right to find that article 11 of the ECHR was engaged, she should have found that the exclusion in section 280 of the 1992 Act amounted to the imposition of unlawful restrictions on the exercise of article 11 rights by UNISON in respect of their members who were employed in "police service".

VI. ANALYSIS

(A) ARTICLE 8 AND ARTICLE 8 TAKEN WITH ARTICLE 14

24. Ms Criddle submits that article 8 is engaged in the present case by virtue of either (1) the mere fact of dismissal from employment or, alternatively, (2) the fact of dismissal and other matters affecting these particular employees in consequence of the dismissals.

25. Ms Criddle relies on a number of ECrtHR cases in support of that submission: *Sidabras v Lithuania* (2006) 42 EHRR 6; *Volkov v Ukraine* [2013] IRLR 480; *IB v Greece* (Application no. 552/10); and *Boyraz v Turkey* [2015] IRLR 164.

26. Ms Criddle pointed out that the Strasbourg jurisprudence in this area has been significantly influenced by international statements of principle: *Sidabras* at para. 47. In that case the two applicants had previously worked for the Lithuanian branch of the KGB. After Lithuania declared independence they became employed as a tax inspector and a prosecutor respectively. Following the passing of certain legislation, they were dismissed from their posts and banned from applying for public sector and various private sector jobs because they were categorised as former KGB officers. The ECrtHR held that there had been a violation of article 14 in conjunction with article 8. The Court said the following at para. 47:

> "… having regard in particular to the notions currently prevailing in democratic states, the Court considers that a far-reaching ban on taking up private-sector employment does affect 'private life'. It attaches particular weight in this respect to the text of Art.1(2) of the European Social Charter and the interpretation given by the European Committee of Social Rights … as well as to the texts adopted by the ILO…. It further recalls that there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention (see, *Airey v Ireland* (A/32): (1979-80) 2 E.H.R.R. 305 at [26])."

27. Ms Criddle referred us to the following international statements of principle. By article 1.2 of the European Social Charter the contracting parties undertook "to protect effectively the right of the worker to earn his living in an occupation freely entered upon". By article 6 of the United Nations International Covenant on Economic, Social and Cultural Rights the State Parties recognised "the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts". Article 15.1 of the EU's Charter of Fundamental Rights specifies that "Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation".

28. Taking the cases relied upon by Ms Criddle in chronological order, the first is *Sidabras*. The ECrtHR held that there had been a violation of article 8 taken alone and in conjunction with article 14. The Court addressed the issue whether the facts fell within the ambit of article 8 at paragraphs 42 to 50. The reasons for the Court's conclusion that it did appear from the following brief extracts:

> "48 Turning to the facts of the present case, the Court notes that, as a result of the application of Art.2 of the Act to them, from 1999 until 2009 the applicants have been banned from engaging in professional activities in various private sector spheres in view of their status as "former KGB officers"…. Admittedly, the ban has not affected the possibility for the applicants to pursue certain types of professional activities. The ban has, however, affected the applicants' ability to develop relationships with the outside world to a very significant degree, and has created serious difficulties for them as regards the possibility to earn their living, with obvious repercussions on their enjoyment of their private life.
>
> 49 … In any event, in the instant case there is more at stake for the applicants than the defence of their good name. They are marked in the eyes of society on account of their past association with an oppressive regime. Hence, and in view of the wide-ranging scope of the employment restrictions which the applicants have to endure, the Court considers that the possible damage to their leading a normal personal life must be taken to be a relevant factor in determining whether the facts complained of fall within the ambit of Art.8 of the Convention.

> 50 Against the above background, the Court considers that the impugned ban affected, to a significant degree, the possibility for the applicants to pursue various professional activities and that there were consequential effects on the enjoyment of their right to respect for their "private life" within the meaning of Art. 8. It follows that Art.14 of the Convention is applicable in the circumstances of this case taken in conjunction with Art.8."

29. In *Volkov* a Ukrainian judge was dismissed by the Ukrainian Parliament "for breach of oath". The ECrtHR found that the dismissal was an unlawful interference with the applicant's article 8 rights. The Government of Ukraine conceded that the removal of the applicant from office had constituted an interference with his right to respect for his private life within the meaning of article 8, and the Court said (at para. 165) that it could see no reason to hold otherwise. The Court continued:

> "165 … [The Court] notes that private life 'encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature' (see *C v Belgium* (1996) EHRR 19, paragraph 25). Article 8 of the Convention 'protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world' (see *Pretty v United Kingdom*, no. 2346/02, (2002) 35 EHRR 1, paragraph 61). The notion of 'private life' does not exclude in principle activities of a professional or business nature. It is, after all, in the course of their working lives that the majority of people have significant opportunity of developing relationships with the outside world (see *Niemietz v Germany*, (1992) 16 EHRR 97, paragraph 29, Series A no. 251-B). Therefore, restrictions imposed on access to profession have been found to affect 'private life' (see *Sidabras and Diautas v Lithuania*, nos. 55480/00 and 59330/00, (2004) 42 EHRR 104, paragraph 47 and *Bigaeva v Greece*, no. 26713/05, paragraphs 22-25, 28 May 2009). Likewise, dismissal from office has been found to interfere with the right to respect for private life (see *Özpinar v Turkey*, no. 20999/04, paragraphs 43-48, 19 October 2010). Finally, Article 8 deals with the issues of protection of honour and reputation as part of the right to respect for private life (see *Pfeifer v Austria*, no. 12556/03, (2009) 48 E.H.R.R. 8, paragraph 35, 15 November 2007 and *A v Norway*, no. 28070/06, paragraphs 63 and 64, 9 April 2009).
>
> 166. The dismissal of the applicant from the post of judge affected a wide range of his relationships with other persons, including the relationships of a professional nature. Likewise, it has an impact on his 'inner circle' as the loss of job must have had tangible consequences for material well-being of the applicant and his family. Moreover, the reason for the applicant's dismissal, namely the breach of the judicial oath, suggested that his professional reputation had been affected."

30. The only issue was whether the dismissal could be justified under Article 8.2 and the Court held that it could not.

31. As noted in paragraph 165 of *Volkov*, similar reputational issues arose in *Özpinar v Turkey* (Application no. 20999/04) in relation to the dismissal of a judge, where there was no dispute that article 8 applied.

32. In *IB v Greece* the applicant, who was HIV positive, was dismissed from his employment as a result of the objections of other employees to working with him because of his medical condition. Shortly after his dismissal the applicant found another job. The ECrtHR held that there had been a violation of article 14 taken in conjunction with article 8.

33. At paras 67-74 the Court considered whether the facts of the case fell within the scope of article 8. The Court said (at para. 70) that "both employment matters and situations involving HIV-infected persons fall within the scope of private life". It then said the following:

> "72. It is clear that the applicant's dismissal resulted in the stigmatisation of a person who, even if they were HIV-positive, had not shown any symptoms of the disease. That measure was bound to have serious repercussions for his personality rights, the respect owed to him and, ultimately, his private life. To that must be added the uncertainty surrounding his search for a new job, since the prospect of finding one could reasonably have appeared remote having regard to his previous experience. The fact that the applicant did find a new job after being dismissed does not suffice to erase the detrimental effect of his dismissal on his ability to lead a normal personal life."

34. In *Boyraz* the applicant was dismissed as a security officer in a branch of a state run electricity company because she was a woman and women were not considered to be suitable as security officers. The ECrtHR held that there had been a breach of article 14 taken in conjunction with article 8.

35. The ECrtHR held that article 8 was applicable to the applicant's complaint for the following reasons:

> "43…With regard to art.8, the Court has already held in a number of cases that the dismissal from office of a civil servant constituted an interference with the right to private life (see *Özpınar v Turkey* (20999/04) 19 October 2010 at [43]–[48]; and *Volkov v Ukraine* (2013) 57 E.H.R.R. 1 at [165]–[167])
>
> 44 Turning back to the circumstances of the present case, the Court reiterates that the administrative authorities dismissed the applicant from her post in 2004 on the ground of her sex. In the Court's view, the concept of "private life" extends to aspects relating to personal identity and a person's sex is an inherent part of his or her identity. Thus, a measure as drastic as a dismissal from a post on the sole ground of sex has adverse

> effects on a person's identity, self-perception and self-respect and, as a result, his or her private life. The Court therefore considers that the applicant's dismissal on the sole ground of her sex constituted an interference with her right to respect for her private life. … Besides, the applicant's dismissal had an impact on her "inner circle" as the loss of her job must have had tangible consequences for the material well-being of her and her family (see *Volkov* (2013) 57 E.H.R.R. 1 at [166]) The applicant must also have suffered distress and anxiety on account of the loss of her post. What is more, the applicant's dismissal affected a wide range of her relationships with other people, including those of a professional nature and her ability to practise a profession which corresponded to her qualifications (see *Sidabras* (2006) 42 E.H.R.R. 6 at [48]; *Volkov* (2013) 57 E.H.R.R. 1 at [166]; and *İhsan Ay* (34288/04) 21 January 2014 at [31])"

36. Turning to domestic authority, Ms Criddle sought to downplay observations of Elias LJ in *Turner v East Midlands Trains Ltd* [2013] ICR 525. In that case the claimant, who was employed by the respondent employer as a senior train conductor, was dismissed on the charge that she had caused faulty tickets to have the appearance of genuine tickets and then fraudulently sold them to members of the public and dishonestly kept the proceeds. She claimed that she had been unfairly dismissed, that article 8 was engaged and that, therefore, the correct question to be asked was whether the dismissal was proportionate rather than the question section 98 of the 1996 Act whether the employer had acted within the range of reasonable responses. The Court of Appeal dismissed her appeal from the EAT, which dismissed her appeal from the ET.

37. Elias LJ said (at para. 28 of his judgment) that the claimant relied upon three consequences of the dismissal, which whether taken individually or cumulatively, engaged article 8. They were: the damage to her reputation caused by a finding of dishonesty; the potential restriction on her ability to obtain other employment as a consequence of that finding and the stigma flowing from it; and the damage wrought by the dismissal on the social relationships which she had developed with her work colleagues.

38. It was conceded on behalf of the employer that, but for the submission that the claimant brought the consequences upon herself, article 8 would have been engaged by virtue of the adverse effect on the claimant's reputation. Elias LJ said (at para. 35) that, in those circumstances

> "it is strictly unnecessary to determine whether the consequences for future relationships or job prospects would of themselves be sufficient to engage it. I am inclined to think that they would not, although the damage to these interests does reinforce the conclusion that prima facie article 8 is engaged because of the adverse effect of the dismissal on the claimant's reputation."

39. Sir Stephen Sedley said the following (at para. 75):

> "What is perhaps more problematical is the question whether, and when, article 8 is 'engaged' in this and other unfair dismissal claims. On one view anything which tends to diminish respect for the individual's private life, in the generous sense in which the Strasbourg court construes that phrase, engages article 8.1 and calls for justification under article 8.2. But, on the view which I prefer, an adjudication which accords proper respect to the individual's personality and capacity for social interaction does not 'engage' article 8.1 at all in the sense of disclosing an apparent breach."

40. Maurice Kay LJ agreed with both judgments.

41. Ms Criddle sought to discount the observations of Elias LJ in para. 35 on the grounds that, as is indeed the case, they were obiter, *Volkov* was not cited and *Boyraz* had not yet been decided.

42. Ms Criddle submitted that, if, contrary to her primary submission, dismissal from employment is not sufficient of itself to engage article 8, the following facts and matters set out in paragraph 5.16 of her skeleton argument ("the paragraph 5.16 consequences") engage article 8 in the present case in respect of both employees: (1) the damage wrought by dismissal on social relationships at work and particularly so after 26 years' employment; (2) the tangible consequences of dismissal for their material wellbeing; (3) the distress and anxiety inherent in the loss of employment alleged to have been the result of unfair differential treatment, the anxiety of looking for alternative employment and the loss of opportunity to practise in their chosen occupations as parks constables; and (4) the difficulties that each could and did envisage in obtaining alternative employment aged 53 and 60 respectively.

43. We consider that it is clear that article 8 is not engaged by the mere fact of dismissal from employment. The Grand Chamber of the ECrtHR set down succinctly the general principles in *Martinez v Spain* (2015) 60 EHRR 3. In that case, the applicant, who had been ordained as a Catholic priest and subsequently married and had five children with his wife, was employed as a teacher of the Catholic religion in a state run school. His personal situation having become the subject of a newspaper article, he was barred from teaching the Catholic religion and his employment was terminated. The ECrtHR held that article 8 was applicable and there had been interference with the applicant's article 8 rights but, having regard to the state's margin of appreciation, the interference with the applicant's right to respect for his private life was not disproportionate.

44. On the question of the application of article 8 to employment, the ECrtHR said the following:

> "109 Whereas no general right to employment or to the renewal of a fixed-term contract can be derived from art. 8, the Court has previously had occasion to address the question of the applicability of art.8 to the sphere of employment. It thus reiterates that 'private life' is a broad term not susceptible to exhaustive definition (see, among other authorities, *Shüth* (2011) 52 E.H.R.R. 32 at [53]). It would be too restrictive to

> limit the notion of 'private life' to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle (see *Niemietz v Germany* (1993) 16 E.H.R.R. 97 at [29]).
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> 110 According to the Court's case-law there is no reason of principle why the notion of 'private life' should be taken to exclude professional activities (see *Bigaeva v Greece* (26713/05) 28 May 2009 at [23], and *Volkov v Ukraine (2013) 57 E.H.R.R. 1* at [165]-[167]). Restrictions on an individual's professional life may fall within art. 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others. In addition, professional life is often intricately linked to private life, especially if factors relating to private life, in the strict sense of the term, are regarded as qualifying criteria for a given profession (see *Özpinar v Turkey* (20999/04) 19 October 2010 at [43]-[48]). Professional life is therefore part of the zone of interaction between a person and others which, even in a public context, may fall within the scope of 'private life'."

45. On the particular facts of the case the ECrtHR held that article 8 was applicable for the following reasons.

> "111 In the present case the interaction between private life *stricto sensu* and professional life is especially striking as the requirements for this kind of specific employment were not only technical skills, but also the ability to be 'outstanding in true doctrine, the witness of … Christian life, and … teaching ability', thus establishing a direct link between the person's conduct in private life and his or her professional activities.
>
> 112 The Court further notes that the applicant, who was not a civil servant but was nonetheless employed and remunerated by the state, had been a religious education teacher since 1991 on the basis of fixed-term contracts which provided for annual renewal at the beginning of each academic year subject to the bishop's approval of his suitability. Thus, whilst it is true that the applicant had never had a permanent contract, a presumption of renewal had given him good reason to believe that his contract would be renewed for as long as he fulfilled those conditions and there were no circumstances that might justify its non-renewal under canon law. In the Court's opinion, the facts of the case bear some resemblance, mutatis mutandis, to those of *Lombardi Vallauri v Italy*. In the present case, the applicant had been a religious education teacher continuously for seven years and had been appreciated both by his colleagues and by the management of the centres where he taught, thus attesting to the stability of his professional situation.

> 113 In those circumstances, the Court takes the view that as a consequence of the non-renewal of the applicant's contract, his chances of carrying on his specific professional activity were seriously affected on account of events mainly relating to personal choices he had made in the context of his private and family life. It follows that, in the circumstances of the present case, art. 8 of the Convention is applicable."

46. Ms Criddle sought to undermine the significance of *Martinez* on the grounds that neither *Sidabras* nor *IB* was cited in the Court's judgment and it was decided before *Boyraz*. There is, however, nothing inconsistent between those cases and *Martinez* and it has not been suggested in either the Strasbourg nor our domestic jurisprudence that *Martinez* is in some way out of line with authority and principle.

47. It is clear from the statements of principle in *Martinez* and the reasoning in that case, as well as the reasoning in all the cases on which Ms Criddle relies, that the mere fact of termination of employment is not sufficient of itself to make article 8 applicable. In paragraph 109 of *Martinez* the Grand Chamber clearly stated that the Convention confers no general right to employment or to the continuation of employment. In none of the cases did the ECrtHR say that article 8 was engaged by the mere fact of dismissal but rather it went on to consider whether the consequences of that particular dismissal made article 8 applicable (in *Volkov* the effect on the applicant's reputation of dismissal for breaching the judicial oath; in the *IB* case the stigmatisation and impact on the applicant's private life; in *Boyraz* the effect on the applicant's identity, self-perception and self-respect; in *Sidabras* the stigma, the impact on creating future social relations and the difficulty of obtaining future employment).

48. Turning to the paragraph 5.16 consequences, we reject the argument of Mr Capewell that these should be disregarded because they are unsupported by any evidence. That argument ignores the reality of the way these proceedings have developed. The employees were acting in person before the ET at a time when the only issue was one of the proper interpretation of the domestic legislation. The application of the Convention only arose before the EAT after the decision of the Court of Appeal in *Redbridge*. The employees amended their Answer to rely on the Convention and the paragraph 5.16 consequences. Those consequences are not admitted by the Council. No one appears to have raised at that stage the need for further particularisation of the consequences or of a remittal to the ET to make findings of fact. Judge Clark thought that the questions in relation to the Convention could be decided as a matter of law. In the circumstances, if the paragraph 5.16 consequences are capable of engaging article 8 or making article 8 applicable for the purposes of article 14, the right course would be to remit the case to the ET to make a decision on the employees' factual allegations.

49. We agree with Mr Stilitz that the paragraph 5.16 consequences are not capable of engaging article 8 or making article 8 applicable for the purposes of article 14. The first point to make is that unfair dismissal is a domestic concept which does not necessarily make article 8 applicable. Accordingly, the fact, if proved, that deficiencies in the redundancy selection process would make those dismissals unfair in domestic law terms, does not of itself make article 8 applicable. Secondly, there is no Strasbourg or domestic case in which it has been held that the mere length of employment, or the inevitable effect of termination of employment on relationships

with work colleagues, or the distress and anxiety arising from the fact of the termination and the need to find new employment, or the relative difficulty of finding new employment according to the age of the employee at the date of dismissal are always sufficient of themselves individually or collectively to engage article 8. Those are matters to a greater or lesser extent involved in every dismissal. They are inapposite as factors engaging article 8 in the context of a collective redundancy, which involves no imputation of wrongful conduct on the part of the employee, carries no stigma, and would involve differential legal consequences according to the particular circumstances or sensitivities of the individual employees who have been made redundant. While it would be unwise to lay down a rule that the circumstances of a redundancy can never engage article 8, there is no particular feature of the present case which takes the situation out of the general run of redundancies and their usual consequences.

50. There was some discussion before us of the jurisdiction and propriety of the UK courts to find that Convention rights exist even in a situation which has not previously been considered by the ECrtHR. Ms Criddle submitted that it is irrelevant that the ECrtHR has not directly considered a case like the present one and the domestic jurisprudence has moved on since the well known statement of Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] AC 323. She relied on *Manchester City Council v Pinnock* [2011] 2 AC 104 at 125E-G; *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 at 111C-D; *R (Kaiyam) v Secretary of State for Justice* [2015] AC 1344 at 1362E-G and *R (Nicklinson) v Ministry of Justice* [2015] AC 657 at 781E-G.

51. We are not deterred from finding that there was no engagement of article 8 in the present case merely because a redundancy case has not previously been considered by the ECrtHR. We find that article 8 is not applicable because, having regard to the principles to be derived from the existing Strasbourg jurisprudence, the present case has no special features capable of bringing the employees within the scope of article 8 consistently with those principles.

52. Turning to article 14, when read in conjunction with article 8, Ms Criddle submitted in her reply submissions that, even if there has been no interference with the employees' article 8 rights, article 14 is still applicable because (1) the right to claim unfair dismissal is part of the means by which the state fulfils its positive obligation to uphold article 8 rights, and (2) when the state takes measures to protect article 8 rights article 14 prohibits discrimination between different groups asserting article 8 rights. She relied upon certain passages in *Steinfeld v Secretary of State for Education* [2017] EWCA Civ 81, [2017] HRLR 202.

53. There were two issues before the Court of Appeal in *Steinfeld*: (1) whether the relevant provisions of the Civil Partnerships Act 2004 which precluded opposite-sex couples from entering into a civil partnership fell within the ambit of article 8 so that the prohibition of discrimination in article 14 was engaged; and, if so, (2) whether the potential breach of the rights of the appellants, an opposite sex couple, was justified as being in pursuit of a legitimate aim and proportionate. On the first point, Ms Criddle relied on [25] - [27], [30] and [34] of the judgment of Arden LJ, which referred to decisions of the ECrtHR on "ambit" or "scope" including *Oliari and Others v Italy* (Application nos. 18766/11 and 36030/11) 40 B.H.R.C. 549, *E.B. v France* (Application No.: 00043546/02) [2008] 1 F.L.R. 850, [2008] 1 F.C.R. 235, and *Petrovic v Austria* (Application no. 20458/92) (2001) 33 E.H.R.R. 14; 4 B.H.R.C.

232, and the discussion of "modalities" in the latter quoted with approval by Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2AC 557 at [10] with whom the majority agreed.

54. Those passages and those principles do not assist the employees in the present case in establishing that the facts of the present case fall within "the ambit" of article 8 for the purposes of applying article 14. The jurisprudence of our own jurisdiction tends to approach issues of infringement of article 8 on a three stage basis: is the relevant Article engaged; have the rights been interfered with; is the interference lawful or unlawful? When considering a case of alleged infringement of article 14, when read in conjunction with article 8, the ECrtHR typically uses different language for that first question, namely whether the situation under consideration falls within the "ambit" of article 8.

55. Two principles are relevant to that issue. First, it is well established that it is not necessary to show a breach of article 8 for a disadvantage to fall "within the ambit" of article 8 for the purpose of engaging article 14: *Zarb Adami v Malta* [2007] 44 EHRR 3 at paras 42 and O-I7. Secondly, the expression "ambit" in this context, while not requiring a violation of a substantive Convention right, does denote a situation in which "a personal interest close to the core of such a right is infringed": *R (Clift) v Secretary of State for the Home Department* [2007] UKHL 54, [2007] 1 AC 484, at para. 13 (Lord Bingham); *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, 1 AC 483, at para. 60 (Lord Hope). As both Lord Bingham and Lord Walker said in *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 at paras. 4 and 60, a tenuous link is not enough. Lord Bingham in that case at para. 4 explained the issue of core values in the following way:

> "It is not difficult, when considering any provision of the Convention, including article 8 and article 1 of the First Protocol ('article 1P1'), to identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not. There is no sharp line of demarcation between the two. An exercise of judgment is called for."

56. In *Steinfeld* Beatson LJ, with whom neither of the other judges disagreed on this point, explained Lord Bingham's language in *Clift* as follows:

> "150 It is true that Lord Bingham's language in *Clift's* case reflects the ratio in that case but, in my judgment, the language of impairment, intrusion and infringement were used to show how closely related to the values protected by art.8 a measure has to be in the context of a substantive breach of art.8 and whether the matter is sufficiently close to the core values protected by art.8 . If there is only a tenuous link to those core values that does not suffice. But in this case the measures in the

> 2004 and 2013 Acts are undoubtedly related to the core values of private and family life as shown by the Strasbourg jurisprudence which I have discussed. Accordingly, I do not consider that the domestic authorities can be regarded as requiring an additional requirement of concrete adverse impact other than deprivation of one of the means by which the State makes provision to recognise and protect those core values."

57. We are not deciding that the facts fall within the ambit of article 8 but there has been no infringement of those article 8 rights. Rather, our decision is that the facts do not fall within the ambit of article 8 at all. They are not closely related to its values. This is supported by the distinction we have drawn between the facts and the reasoning of the ECrtHR in *Sidabras* and *Boyraz* and the present case. It is also supported by the following observation of Lord Walker in *M v SSWP* at para. 83 of his judgment in relation to *Sidabras*:

> "Banning a former KGB officer from all public sector posts, and from a wide range of responsible private-sector posts, is so draconian as to threaten his leading a normal personal life *Sidabras v Lithuania* 42 EHRR 104. Less serious interference would not merely have been a breach of article 8; it would not have fallen within the ambit of the article at all."

58. For those reasons in the present case article 14 has no application, when read in conjunction with article 8.

(B) ARTICLE 11 AND ARTICLE 11 TAKEN WITH ARTICLE 14

59. UNISON's primary case in this regard is that the exclusion, by section 280 as construed in accordance with the *Redbridge* decision[2], of parks police officers from the protections afforded by sections 188-192 of the 1992 Act is a breach of their article 11 rights, and thus also of its own rights as the union representing them; but its fallback argument is that it is a breach of article 14 read with article 11. We summarised the Judge's conclusion on that case at para. 19 above.

60. We take the primary argument first. We should say by way of preliminary that Mr Stilitz for the Secretary of State has not offered any justification for the exclusion of parks police officers from the scope of the 1992 Act in general or the provisions of sections 188-192 in particular. His case is squarely that there is no *prima facie* interference with the Appellants' article 11 rights which would require justification.

61. As to that, the starting-point is that since the decision of the ECrtHR in *Demir* it has been established that "the right to bargain collectively with the employer has, in principle, become one of the essential elements" of the rights afforded by article 11, and that those rights are enjoyed by employees of public authorities as well as by employees in the private sector (subject to article 11 (2), as to which see para. 64 below): see para. 154 of the judgment of the Grand Chamber.

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[2] The Court in *Redbridge* was concerned only with section 200 of the 1996 Act, but the material provisions are identical.

62. Mr Stilitz argued that that right did not include a right to be consulted about proposed dismissals, whether by reason of redundancy or otherwise. He referred to the various international agreements on which the Court relied, and from which it quoted extensively, in *Demir*: all these treat "collective bargaining" as bargaining about "conditions of employment" or "working conditions". He said that in no case had the ECrtHR treated article 11 as covering a right of this kind.

63. We do not accept that argument. In our view a right of the kind conferred by sections 188-192 of the 1992 Act – that is, (in the case of the union) to be consulted, and (in the case of the employees) to be consulted for – falls squarely within the "essential elements" protected by article 11. There may be room for argument about whether they fall within the definition of "collective bargaining" in the narrow sense of that term. In traditional industrial relations terminology, at least in the UK, a distinction tends to be drawn between negotiating rights and consultative rights, and the term "collective bargaining" tends to be reserved for the former; likewise the core content of collective bargaining tends to be thought of as matters like pay, hours and holiday. But the question is one of substance rather than terminology. The rights conferred by sections 188-192 of the 1992 Act are collective in character, since they involve the consultation of a trade union about the prospective dismissal of at least twenty employees. The "consultation" required has to be undertaken "with a view to reaching agreement" (see section 188 (2)). Its object (to paraphrase heads (a)-(c) of that sub-section), is to achieve, so far as possible, the continuation of the employment of the employees whose jobs are at risk or, failing that, to reach agreement the terms on which they are to be dismissed. We see no difficulty in describing the preservation of the employment relationship or the terms on which it is ended as an aspect of "working conditions", broadly understood[3]; but even if that is not so the matters in question are of equal importance to "working conditions" in the narrower sense. Thus, whether or not the consultation rights afforded to a recognised trade union by sections 188-192 constitute "collective bargaining" in the sense that the Grand Chamber used that term in *Demir*, they are so closely analogous to the rights there recognised that they are plainly to be treated as "essential elements" of the rights protected by article 11. In that connection, we note that long before *Demir* the

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[3] In this connection we note para. 215 (headed "Content of Collective Bargaining"), of the ILO's General Survey on the Fundamental Conditions Concerning Rights at Work Report III (2012), which begins as follows:

> "Conventions Nos 98, 151 and 154 and Recommendation No. 91 focus the content of collective bargaining on terms and conditions of work and employment, and on the regulation of relations between employers and workers and their respective organizations. The concept of 'conditions of work' covers not only traditional working conditions (the working day, additional hours, rest periods, wages, etc.), but also subjects that the parties decide freely to address, including those that are normally included in the field of terms and conditions of employment in the strict sense (promotion, transfer, dismissal without notice, etc.). In practice, although conditions of work remain essential issues addressed by most collective agreements, the range of the subjects addressed has progressively broadened to reflect the evolution of industrial relations. Agreements increasingly frequently cover issues related, for example, to recruitment levels, safety and health, restructuring processes, training, discrimination and supplementary social security benefits."

ECrtHR had held that "the members of a trade union should have a right, in order to protect their interests, that the trade union should be heard …" (see *Swedish Engine Drivers' Union v Sweden* [1978] ECC 1): consultation about mass redundancy seems a paradigm example of a matter affecting members' interests.

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

65. That conclusion is fatal to the Secretary of State's, and thus also Wandsworth's, case on the issue of principle. As we have said, he has not sought in this case to advance any justification for the exclusion of parks police officers, or trade unions representing them, from the rights accorded by sections 188-192. In the absence of such justification the exclusion must represent a breach of their, and their union's, article 11 rights.

66. We should in this connection refer to article 11 (2), which provides that there may be lawful restrictions on the exercise of freedom of association by members of the armed forces, police or the administration of the State. As to this, the Grand Chamber in *Demir* stated (at para. 97) that:

> "The restrictions imposed on the three groups mentioned in art 11 are to be construed strictly and should therefore be confined to the 'exercise' of the rights in question. These restrictions must not impair the very essence of the right to organise. On this point the Court does not share the view of the Commission that the term "lawful" in the second sentence of art 11 (2) requires no more than that the restriction in question should have a basis in national law and not be arbitrary and that it does not entail any requirement of proportionality. Moreover, in the court's view, it is incumbent on the State concerned to show the legitimacy of any restrictions to such persons' right to organise."

At para. 119 the court reiterated that the exceptions are to be construed strictly, stating that "only convincing and compelling reasons can justify restrictions" on freedom of association and that "states only have a limited margin of appreciation". It will be seen that in the absence of any attempt at justification on the part of the Secretary of State article 11 (2) is of no assistance to him.

67. We should refer to two other arguments advanced by Mr Stilitz.

68. First, he referred to the fact that the terms of section 188-192 were enacted in order to comply with the Collective Redundancies Directive, 98/59/EC, which does not apply to "workers employed by public administrative bodies or by establishments governed

by public law (or, in Member States where this concept is unknown, by equivalent bodies)" (see article 1.2 (b)). He submitted that that exclusion was a "powerful indication" that these were not rights guaranteed by article 11. We do not see how the terms of an EU Directive can shed light on the scope of the ECHR. In any event the argument is a *non sequitur*. The issue of what rights are guaranteed by article 11 is a prior question to the question whether such rights have been excluded.

69. Secondly, he referred to Wandsworth's case, as advanced in its ET3, that there had in fact been very extensive consultations about the proposed redundancy situation, which would have fully satisfied its obligations under section 188 if it applied. He submitted that in those circumstances neither UNISON nor the employees had been the victim of any breach. But that argument cannot succeed in circumstances where there has been no judicial determination of the facts in these cases (see para. 11 above) and at present the appellants are unable to obtain such a determination because the terms of section 280, as construed by the EAT, mean that the tribunal has no jurisdiction.

70. Our conclusions thus far mean that it is not necessary to consider UNISON's alternative case based on article 14. Although we heard interesting submissions both on the question of whether the employees' occupation could constitute "another status" within the meaning of the article and, if it could, on whether UNISON, as opposed to the employees themselves, could rely on that status we think it better that those questions be decided in a case where they may be determinative.

71. The remaining question is whether it is possible, applying section 3 of the Human Rights Act 1998, to construe section 280 of the 1992 Act in such a way that it does not infringe the article 11 rights of the appellants by excluding them from the rights accorded by sections 188-192. Slade J held that it was not, but the appellants challenge that conclusion. The correct approach to the application of section 3 is authoritatively established by the decision of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 and in the further decision of this Court in *Vodafone 2 v Her Majesty's Commissioners of Revenue and Customs* [2009] EWCA Civ 446, [2010] Ch 77 (see esp. at paras. 37-38), and there is no need to summarise it here.

72. Both before the EAT and before us there was a good deal of discussion about how the language of section 280 might be modified so as to exclude members of the parks police from its effect. Ms Criddle focused in particular on the concept of a person having "all" or "the full" powers of a constable. That ran into difficulties because it was unclear what it really meant. It appears from Jackson LJ's analysis in *Redbridge* that parks police officers do indeed have all the powers of a constable, though only in a limited geographical area (see in particular para. 54). But making the existence of a limited geographical jurisdiction the touchstone of exclusion would be unsound because there are other constabularies with geographical limitations (albeit of a more qualified kind): see para. 49 of Jackson LJ's judgment.

73. The real problem here is that the distinction between those employees who should be caught by section 280 and those who should not, in order to avoid a breach of article 11, needs to correspond to the existence of a justification for that exclusion. As we have already said, the Secretary of State has offered no justification for the exclusion of the employees in the present case; and in practice that stance must extend to all

"parks police". But it is highly unlikely that he would maintain the same stance in relation to all employees in police service. It is true that forces maintained under the Police Act 1996 are not in the picture in the first place, since constables who are members of those forces are office-holders and not employees (see *Redbridge* at paras. 53 and 62), but there are other substantial constabularies whose members are employees – see *Redbridge* para. 63, where Jackson LJ gives as examples the British Transport Police, the Ministry of Defence Police and the Civil Nuclear Constabulary. We infer, though the point was not explored before us, that the Secretary of State would argue that, in so far as justification was required for the exclusion of such employees from the scope of the 1992 Act (or indeed from most of the rights under the 1996 Act), that consists in the existence of "other elaborate remedies" of the kind referred to by Jackson LJ at para. 68 of his judgment, involving their own Federations (see para. 10 above). Although the existence of other effective remedies would in principle be a good justification, we were not addressed about this aspect and are not in a position to formulate a dividing-line based on it.

74. However, we do not believe that our inability to formulate a draft amendment to section 280 which definitively distinguishes between the classes of employees whose exclusion is or is not justified is fatal. As the authorities from *Ghaidan* onwards make clear, it is not necessary, even though it is often useful, for a court to commit itself to such a formulation. In our view it would be sufficient for us to say that, when construed in accordance with section 3, section 280 does not apply to the class with which we are here concerned – that is to say, persons employed as constables by virtue of article 18 of the 1967 Order or section 77 of the 1907 Act.

75. The question then is whether such a construction would go against the grain of section 280 or be contrary to its fundamental features. We do not believe that it would. We regard it as sufficiently evident that the primary statutory intention was to exclude from the scope of the 1992 Act employees of "traditional" police forces. Jackson LJ observed in *Redbridge* that there appeared to be no rational policy reason for the exclusion of employees in the parks police from the right to claim for unfair dismissal (see para. 68 of his judgment), and in the light of the failure of the Secretary of State on this appeal to advance any justification case the same must go for their exclusion from the scope of the 1992 Act. That being so, we regard it as likely that Parliament was focused on the more substantial police forces who employ constables and simply failed to appreciate the effect of the statutory language on this fairly small group of employees.

76. Slade J in the EAT reached a different conclusion: see paras. 57 and 58 of her judgment. In part she was focusing on a formulation advanced by Ms Criddle which was not pursued before us. But she also expressed the view that any proposed distinction based on whether the employee exercised the "full" powers of a constable was unworkable. As appears above, we agree with that; but that objection does not have any application to the approach which we have adopted.

77. That conclusion means that the question of making a declaration of incompatibility does not arise.

VII. RELIEF

78. It follows from our conclusion on the article 8 issue that the employees' appeals against the dismissal of their claims for unfair dismissal must themselves be dismissed. We do not reach this decision with any satisfaction. In *Redbridge* both Longmore and Jackson LJJ expressed the view that the exclusion of parks police from unfair dismissal protection was anomalous and an apparent injustice. We agree. Longmore LJ urged Parliament to consider the position. Mr Stilitz told us that the Government had initiated no review but was awaiting the result of these proceedings. That position is hard to understand. Even if – as has turned out to be the case – the current state of affairs falls outside the scope of article 8 that does not make it any the less unjust, and the views expressed in *Redbridge* were not based on the position under the ECHR. We would urge the Government now to reconsider the position as a matter of urgency.

79. As regards UNISON's claim, we have held that the provisions of section 280 of the1992 Act, construed so as to give effect to its article 11 rights, do not exclude it from pursuing a claim under section 189. Accordingly its appeal against that aspect of the order of the EAT must be allowed and the original decision of the ET restored. The effect will be that the substance of that claim will have now to be determined by the ET.

APPENDIX

The European Convention on Human Rights

"**ARTICLE 6**

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

…

ARTICLE 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.

…

ARTICLE 11

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.

…

ARTICLE 14

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

The Relevant Provisions of Council Directive 98/59/EC ("the Collective Redundancies Directive")

"Article 1.2(b)

2. This Directive shall not apply to –

…

(b) workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies);"