

BERR

Department for Business
Enterprise & Regulatory Reform

**ECHR JUDGMENT IN THE ASLEF V
UK CASE – IMPLICATIONS FOR
TRADE UNION LAW**

Government Response to
Public Consultation

NOVEMBER 2007

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GOVERNMENT RESPONSE TO PUBLIC CONSULTATION

CONTENTS

SUMMARY	3
CHAPTER ONE – INTRODUCTION	4
CHAPTER TWO – IMPLICATIONS OF THE COURT’S JUDGMENT	7
CHAPTER THREE – THE GOVERNMENT’S PROPOSED OPTIONS.....	12
CHAPTER FOUR – OTHER COMMENTS	16
Annex A: List of Respondents	20

SUMMARY

In May this year, the Government issued a consultation document in which it set out proposals to amend trade union law in the light of the judgment of the European Court of Human Rights in the *Aslef v UK* case.

Thirty-three organisations responded to the consultation, 26 of which were trade unions.

The Government reaffirms its view that the Trade Union and Labour Relations (Consolidation) Act 1992 must be amended.

The consultation document put forward two Options (A and B) to amend the 1992 Act. The Government has concluded that Option A should be pursued.

The Government does not consider that any other changes to the 1992 Act are required in order to achieve compliance with the European Convention on Human Rights in response to the judgment.

The Government will use the forthcoming Employment Bill to implement its proposal to amend the 1992 Act. The Government will provide an Impact Assessment on the Bill's provisions when it is introduced into Parliament. A section of that Impact Assessment will examine the Government's proposal to amend trade union law.

CHAPTER ONE – INTRODUCTION

1.1 On 27 February 2007, the European Court of Human Rights (the "Court") issued a judgment in the case of *Aslef v The United Kingdom* (Application no. 11002/05). The judgment became final on 27 May 2007.

1.2 The case concerns the freedom of trade unions under GB law to expel or exclude individuals on the grounds of their political party membership or activities. The Court concluded that the relevant part of GB law violated Article 11 of the European Convention on Human Rights (the "Convention").

1.3 The UK Government has announced its intention to amend the relevant part of trade union law to ensure its compatibility with the Convention in the list of the Court's judgment. On 16 May 2007, the DTI published a consultation document presenting proposals to change the law. The consultation closed on 8 August 2007.

1.4 Since the consultation began, the DTI has been abolished and the Department for Business, Enterprise and Regulatory Reform (BERR) has been created. BERR now has lead policy responsibility within Government for this review.

1.5 This document summarises the views received during the consultation and sets out the Government's response to the issues raised.

Responses to the consultation

1.6 The consultation document was sent to all trade unions and employers' organisations listed by the Certification Officer. It was also sent to a range of other bodies including legal organisations and non-departmental public bodies. The document was posted on the DTI's website.

1.7 A total of 33 responses were received, and they are classified in the table below.

Category	Number of responses
Trade unions	26
Lawyers and Lawyers' Organisations	5
Employers	1
Non-Departmental Public Bodies	1
Total	33

1.8 A list of those respondents who were willing to have their names and responses disclosed can be found at **Annex A**. The Government would like to thank all respondents for their contributions.

Understanding this document

1.9 The consultation document presented three specific questions for consultees to address. Chapters 2, 3 and 4 of this document address these three questions in turn.

1.10 Each chapter presents a summary of the views expressed by respondents. Not every respondent is cited in each case, not least because some submissions expressed similar views already expressed by others. There then follows a section in which the Government's response to those views is presented. The Government's main conclusions and recommendations are set out in bold lettering.

Next steps

1.11 It is the Government's intention to change the law as soon as possible. The Government will use the forthcoming Employment Bill to make the necessary changes, which the Government plans to introduce in this Parliamentary session.

1.12 An Impact Assessment will accompany the Bill. A section of that Impact Assessment will appraise the regulatory change which the Government proposes making.

CHAPTER TWO – IMPLICATIONS OF THE COURT’S JUDGMENT

2.1 The consultation document described the Court's judgment and presented the Government's assessment of its implications. It stated that the Government had concluded that some provisions within section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the "1992 Act") were incompatible with the Convention. It presented the following two Options for changing the law:

Option (A) – Section 174 should be amended to ensure there is no explicit reference to a special category of conduct relating to political party membership or activities.

Option (B) – The special category of conduct relating to political party membership and activities should be retained in Section 174 but the rights not to be excluded or expelled for such conduct should be significantly amended. The amendment would refer to the limited conditions under which it would remain unlawful for the trade union to exclude or expel an individual on the grounds of their political party membership or activities. Those conditions would specify that the union's decision would be unlawful unless the political party membership or activity concerned was incompatible with a rule or objective of the union, and the decision to exclude or expel was taken in accordance with union rules or established procedures.

2.2 Consultees were asked to consider the following question:

Question 1 – What is your assessment of the Court’s judgment and do you agree with the Government’s proposal to respond to the judgment by adopting either Option A or Option B?

2.3 This Chapter reports the responses to this question.

Views of Respondents

2.4 Nineteen organisations responded to Question 1.

2.5 Some respondents completely agreed with the Government's assessment of the judgment and the suggested policy response. These included the Community and District Nurses Association, Oldham Trades Union Council, the Union of General and Volunteer Workers and the Royal College of Midwives.

2.6 The majority of unions thought that the implications of the judgment were more far-reaching than the consultation document had acknowledged. The TUC, in common with other union respondents, drew attention to those parts of the judgment which referred to union autonomy and the freedom of trade unions to determine their own rules and membership requirements. They also stressed the significance they attached to those aspects of the judgments which referred to ILO Conventions and the European Social Charter, and to the interpretation of those treaty obligations. They considered that the Court's judgment asserted the collective rights of the union over the rights of individuals. In their view, the judgment provided little scope for governments to limit the scope of union autonomy. They pointed to the Court's analysis of the limited detriment which individuals face in the UK when they are not allowed to belong to a union. The GMB referred to the fact that most collective agreements covered both union and non-union members. Several respondents including Thompsons and Unite mentioned that section 174 pre-dated legislation to outlaw the closed shop. This was significant because the ending of the closed shop meant that individuals who were denied union membership could no longer be discriminated against in employment as a result.

2.7 Most union respondents referred to the various other provisions within section 174, which were unaffected by either Options A or B. These provisions also limited the extent to which unions were free to exclude or expel individuals: for example, they made it unlawful to exclude or expel on grounds of previous union membership. In their view, the judgment required

section 174 to be entirely repealed because the section restricted the ability of trade unions to set up their own rules concerning conditions of membership. The Institute of Employment Rights (IER) supported the case for the entire section to be repealed. It referred to the original aim of the legislation as creating a market in trade union membership; such an aim could not justify the restrictions imposed by the section.

2.8 Three respondents (Thompsons, Associated Society of Locomotive Steam Enginemen and Firemen (Aslef) and Community) did not think that either Option A or Option B were acceptable. Aslef had considerable reservations whether either Option “would assist to clarify the law following the decision in the ASLEF v UK”.

2.9 Many trade unions thought that the judgment had implications for other sections of the 1992 Act. They argued that the principles espoused by the Court about the autonomy of trade unions applied to other parts of trade union regulation, including the regulation of industrial action. Their proposals to change these other aspects of trade union law are described in Chapter 4.

Government Response

2.10 The responses to the consultation confirm the Government's initial view that the judgment requires some change to trade union law. Opinions were divided on the extent to which change should occur.

2.11 The Government acknowledges that the judgment concerns union autonomy and the rights of unions to set and apply their membership rules. It re-affirms its commitment to amend the relevant parts of trade union law to comply with the Court's judgment in this case.

2.12 The Government acknowledges that the Court sought to apply general principles about freedom of association when assessing the issues raised by this case. Some union responses drew attention to those remarks. However,

those comments were made against the particular circumstances of the *Aslef* case. That case was a stark one because Mr Lee's political allegiances were far removed from the union's and those of most other union members. It was also plain to the Court that Mr Lee or others would suffer no obvious financial detriment by losing his membership of *Aslef*. It therefore took the view that the union should have been free to exclude Mr Lee on the grounds of his political engagement. The particular provisions within section 174 which made it unlawful for the union to expel Mr Lee on those grounds are therefore at issue. It is wrong in the Government's view to extrapolate the Court's judgment and assert, as the TUC and others have done, that the entire section is viewed as incompatible with the Convention. In other words, it does not follow that the Court would have taken the same judgment if it had been asked to assess the compatibility of other parts of section 174 against the Convention.

2.13 For example, under section 174, it is unlawful for a union to expel or exclude a person who has made an assertion or lodged a formal complaint that the union has broken its rules or has infringed a statutory requirement. This provision makes it unlawful for trade unions to victimise their own members who are trying to make the union accountable and to protect the union's assets against possible misuse. It would therefore infringe the rights of union members to exercise control over their union, in a way which is necessary in a democratic society, if this provision were to be removed. The importance of union rules is central to the Court's reasoning in the *Aslef v UK* case. That same consideration might therefore lead the Court to take the view that this part of section 174 is compatible with the Convention.

2.14 Other provisions within section 174 concern arrangements which prevent unions from refusing to admit persons into membership who have been, or have ceased to be, members of another union. These provisions make it possible for individuals to move relatively freely between unions, seeking out the union which provides them with the best value for the subscriptions they pay. In other words, the law seeks to ensure that unions, like other institutions in society, do not operate in an anti-competitive fashion,

restricting the ability of individuals to select the union which could best serve their needs. Unions vary in the quality and price of the services they offer. Individuals who want to belong to a union for the protection of their interests would therefore suffer a detriment if they were in effect forced to belong to a union with inferior service or more expensive subscriptions. Again, because the circumstances are so different from the Aslef case, the Government is not at all convinced that the Court would definitely rule that such provisions were incompatible with the Convention. It is possible, for example, that the Court might consider that the Government has a greater margin of appreciation when framing the law in that area because wider concerns about competition policy come into play.

2.15 The Government considers it the safest policy to interpret the Court's judgment as requiring changes to those provisions within section 174 which directly relate to political party membership and activities. It does not therefore intend to make wider changes to section 174.

CHAPTER THREE – THE GOVERNMENT'S PROPOSED OPTIONS

3.1 As mentioned in the previous Chapter, the consultation document presented two alternative Options (Option A and Option B) identified by the Government to amend Section 174 to ensure compatibility with the Convention. Consultees were asked to consider the following explicit question about the two Options:

Question 2 – Which Option (either A or B) do you prefer?

This chapter describes the response to this question and the reasons used by respondents to explain their choice.

Views of Respondents

3.2 Thirty organisations responded directly to Question 2. A clear majority of respondents – twenty-six to four favoured Option A.

3.3 As reported in the previous Chapter, most trade unions and several other respondents thought that neither of the two Options would be sufficient to ensure that UK law did not breach the Convention. However, most were prepared to indicate a preference between the two Options. The TUC, along with most unions, preferred Option A. RCM believed that Option A would “preserve the trade union tradition of autonomy in formulating its own rules and would simultaneously allow redress for the individual who may bring a breach of rule claim before the courts”. UNISON and Broadcasting Entertainment Cinematograph and Theatre Union (BECTU) believed that Option A would offer more clarity in law, and UNISON argued that “it would give unions the autonomy the Court agreed they should be given”.

3.4 Many unions, for example UNISON, Nation Union of Teachers (NUT), and Prospect believed that this Option would not be liable to abuse. The TUC, the National Union of Journalists (NUJ) and Prospect support the Government’s view that there is no evidence that unions would be seeking to expel or exclude members from mainstream political parties once the law

changes. UNISON argued that unions exist to recruit and organise workers rather than to exclude them from union membership.

3.5 Three of the five responses by legal organisations preferred Option A. The Employment Lawyers' Association (ELA) thought that Option A had the benefit of simplicity of wording and could be easily understood by union members and potential union members. The Commission for Racial Equality (CRE) preferred Option A as long as there were safeguards to prevent abuse. They expressed concern that there would be no safeguards against arbitrary expulsions and non-admissions by trade unions, and claimed that 'whilst unions will act reasonably in these matters, there should be no scope for any union to act arbitrarily on the grounds of political membership'.

3.6 In contrast, the British Association of Dental Nurses favoured Option B as it provided safeguards to prevent potential abuse. Likewise, the Association of Principal Fire Officers (APFO) preferred Option B as it would reduce the potential for abuse within a trade union. The Engineering Employers Federation (EEF) believed that the consultation document had succinctly provided the rationale for preferring this Option. They also argued that Option B would result in fewer grey areas than Option A. The Law Reform Committee of the Bar Council of England and Wales believed Option A "goes significantly beyond the requirements of the ECtHR's judgment and lends itself to potential abuse by trade unions". They also agreed with Option B, provided sufficient safeguards were included to prevent unions which may be affiliated with a mainstream political party from expelling (or not admitting) individuals who are members of another mainstream political party.

3.7 The TUC argued that Option B would introduce unnecessary and unjustified complexity into the legislation, and would represent excessive regulation. This view was widely shared by unions. For example, UNISON claimed that Option B would easily lead to questions of interpretation, which only the courts could resolve. Thompsons Solicitors stated that Option B was unworkable and unnecessary; they argued that many union rule books already refer to racist, xenophobic or extremist political behaviour as

unacceptable. Therefore, little adaptation would be required. The Union of Shop, Distributive and Allied Workers (USDAW) argued that Option B would introduce grey areas and 'give scope for legal action about the precise meaning of a union's rules and objectives'. In addition, they argued that this Option could "open the door to legal action aimed at testing the compatibility of membership and/ or activities of a particular political party with a trade union's rules or objectives". Most unions considered that their rules already protected members against arbitrary expulsions. Some mentioned that members could make complaints to the Certification Officer about such alleged breaches of union rule, a point which was not mentioned in the consultation document.

Government Response

3.8 The Government wants to amend the law in ways which achieve clarity and avoid unnecessary complication. It has concluded that Option A is a simpler formulation which would be easier to understand and apply in practice.

3.9 The Government considers that there are good safeguards against abuse in the shape of union rules. It agrees that the Certification Officer has the power under Section 108A of the 1992 Act to determine complaints about a breach of rule in expulsion cases. The Certification Officer is a cheaper and more informal alternative to the courts, and his role usefully complements the courts in ensuring adequate access to justice in this area. In any event, the Government agrees with the views expressed by trade unions and others that there is no evidence of abuse by unions or the arbitrary persecution of individuals on the grounds of their political beliefs. Their action against political extremists has been rooted in clear decisions by trade unions to oppose racism and xenophobia within their ranks and within society more generally. A change in the law will enable unions to adopt rules, as necessary, which make it clear whether membership of particular political parties, which espouse such views, is incompatible with membership of the union.

3.10 The Government therefore agrees with the preference expressed by the large majority of respondents and has decided to pursue Option A.

CHAPTER FOUR – OTHER COMMENTS

4.1 Respondents were asked to consider the following question:

Question 3 – Do you have any other comments on this issue or the Regulatory Impact Assessment which accompanies it?

This Chapter reports responses to this question.

Views of Respondents

4.2 Twenty-one organisations responded to Question 3.

4.3 A majority of union respondents argued that the Government should make wider amendments to the 1992 Act than were proposed in the consultation document. Their view that section 174 should be entirely repealed was discussed in Chapter 2. This Chapter discusses their suggestions to revise other parts of the 1992 Act.

4.4 The TUC suggested that that the following changes to the law should be made in response to the judgment.

– **Sections 64 to 67 of the 1992 Act** should be repealed. These sections give an individual the right not to be unjustifiably disciplined by their union. The TUC believed that these protections for union members were inconsistent with the judgment and its stress on the freedom of unions to determine their own rules, including their disciplinary rules. According to the TUC, these sections had also been heavily criticised by the ILO's Committee of Experts and the European Council's Social Rights Committee. The TUC considered it wrong that these sections should make it unlawful for a union to discipline its members for failing to obey an instruction to take industrial action following a lawfully organised industrial action ballot.

– **Section 226A of the 1992 Act** should be reviewed to assess whether they place unjustified restrictions on union autonomy. This section deals with the

requirement on unions to notify affected employers in advance of an industrial action ballot.

4.5 Most respondents supported these two TUC proposals, and justified them in similar terms. However, the Institute of Employment Rights suggested that only some parts of section 64 (subsections 2(a), 2(b) and 2(f) - (i)) should be repealed on the basis of the judgment.

4.6 Some respondents added the following suggestions to amend the 1992 Act:

– Unite and the National Association of Schoolmasters Union of Women Teachers (NASUWT), among others, argued that **Section 15 of the 1992 Act** should be repealed. This section prohibits the use of unions funds to indemnify individuals against paying a penalty for committing an offence or a contempt of court. These unions pointed out that this section had been criticised by the European Council's Social Rights Committee.

– USDAW, the Communication Workers Union (CWU) and the Institute of Employment Rights considered that **Chapter VI of the 1992 Act** concerning political funds and union spending on political objects should be repealed. These provisions they believed interfered with trade union autonomy in a manner which was inconsistent with the judgment.

– The Institute of Employment Rights and the CWU suggested that **Section 152 of the 1992 Act** should be amended. This section provides protection against dismissal on grounds of trade union membership, trade union activities or the use of trade union services. They believe that these protections may have been weakened by the changes to the Employment Rights Act 1996 consequent upon the Age Discrimination Regulations, which make it lawful for employers to dismiss union activists or other employees provided that they are notified that they are to be retired.

– The National Union of Rail, Maritime and Transport Workers (RMT) argued that the Government should respond to the judgment by making it lawful to engage in **secondary industrial action**. The NASUWT also called for extensive changes to industrial action law to reflect the views expressed by advisory committees to the ILO and the Council of Europe.

4.7 Among other comments made by respondents, the Employment Lawyers' Association referred to **Section 108A of the 1992 Act**, which provides for current or former union members to complain to the Certification Officer about certain breaches of union rule. That section has importance in enabling individuals to seek redress where they have been expelled contrary to union rules for political engagement. The ELA noted that non-members of the union could not make a complaint to the Certification Officer where the union similarly breached their rules when excluding them from membership. The Law Society of Scotland and others referred to the compensatory remedies for a breach of section 174, which are subject to both minimum and maximum limits. They questioned whether it is necessary for either limit to be retained. They thought that the 'lower limit (currently £6,600) may simply encourage speculative or publicity-seeking litigation'.

4.8 No comments were received about the partial Regulatory Impact Assessment which was appended to the consultation document. However, the NASUWT stated that the law created considerable scope for disaffected members to take frivolous or vexatious legal action against the union. Such actions had cost the unions many thousands of pounds to defend. It therefore called for more action to deter or penalise those who brought frivolous or vexatious claims before the Certification Officer or an employment tribunal.

4.9 Several unions described their policies to resist racism and their opposition to the BNP.

Government Response

4.10 The Government is a firm supporter of the ILO. It believes it is fully complying with its legal obligations regarding those ILO Conventions it has ratified. It is not unusual for member states of the ILO and the Council of Europe to have differing views about the practical application of their treaty obligations. Those obligations are worded generally and have to apply across a wide range of industrial relations systems and practices. Issues therefore often arise as to the interpretation of the obligations in these differing settings and contexts.

4.11 Respondents, especially trade unions, mentioned exchanges with the ILO and others about the UK's trade union law. They have advised the Government to respond to this particular judgment by making other changes to the law in response to the various points made by the ILO and others. The Government does not intend to do so. First, it considers that UK law complies with these international obligations. So, the Government does not agree that there is a need to change the law. Second, the present consultation on policy concerns the need to amend UK law to ensure that the UK faithfully complies with the Convention in the light of this particular Court judgment. As explained in Chapter 2, the Government's analysis of the case does not lead it to conclude that wide-ranging changes to section 174 are needed. It follows that the judgment has less relevance still to other parts of the 1992 Act.

4.12 As regards to the penalties regime for breaches of section 174, the Government considers that the current sanctions are proportionate. Unions can avoid paying compensation at this level if they admit or re-admit a person into membership following a tribunal's declaration that an exclusion or expulsion is unlawful. It is right and proper that there should be a significant deterrent in place to ensure that trade unions act in accordance with the law.

4.13 The Government has therefore decided not to make any other changes to the 1992 Act in response to the judgment, other than those resulting from the implementation of Option A.

Annex A: List of Respondents

All thirty-three respondents listed below were willing for their identities to be disclosed:

<p>Association of Principal Fire Officers (APFO)</p> <p>Association of Teachers and Lecturers (ATL)</p> <p>Associated Society of Locomotive Steam Enginemen and Firemen (ASLEF)</p> <p>Bar Council (law reform committee)</p> <p>British Association of Dental Nurses</p> <p>Broadcasting Entertainment Cinematograph and Theatre Union (BECTU)</p> <p>Community</p> <p>Community and District Nurses Association</p> <p>Communication Workers Union (CWU)</p> <p>Commission for Racial Equality (CRE)</p> <p>Dental Practitioners' Association (DPA)</p> <p>Engineering Employers Federation (EEF)</p> <p>Employment Lawyers' Association (ELA)</p> <p>GMB</p> <p>Greater Manchester Association of Trades Union Councils</p> <p>Institute of Employment Rights (IER)</p> <p>Law Society of Scotland</p> <p>National Association of Schoolmasters Union of Women Teachers (NASUWT)</p> <p>National Union of Rail, Maritime and Transport Workers (RMT)</p> <p>Nation Union of Journalists (NUJ)</p> <p>National Union of Teachers (NUT)</p> <p>Oldham Trades Union Council</p> <p>Prospect</p> <p>Public and Commercial Services Union (PCS)</p> <p>Royal College of Midwives</p> <p>Shield Guarding Staff Association</p>	<p>Thompsons Solicitors</p> <p>Trades Union Congress (TUC)</p> <p>UNISON</p> <p>Union of General and Volunteer Workers</p> <p>Union of Shop, Distributive and Allied Workers (USDAW)</p> <p>Unite (Amicus)</p> <p>University and College Union (UCU)</p>
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