



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

**CASE OF YAKUT REPUBLICAN TRADE-UNION FEDERATION
v. RUSSIA**

(Application no. 29582/09)

JUDGMENT

Art 11 • Form and join trade unions • Trade-union federation ordered to expel grassroots union of working prisoners because of statutory ban on their unionisation • Freedom of trade union to join federation and freedom of federation to admit trade union protected by Art 11 • Prison work not equivalent to employment • Trade-union freedom difficult to exercise in detention • Insufficient European consensus • Wide margin of appreciation not overstepped

STRASBOURG

7 December 2021

FINAL

07/03/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Yakut Republican Trade-Union Federation v. Russia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Georgios A. Serghides, *President*,

Paul Lemmens,

Dmitry Dedov,

Alena Poláčková,

María Elósegui,

Gilberto Felici,

Erik Wennerström, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the application against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian organisation, Yakut Republican Trade-Union Federation (“the applicant federation”), on 28 March 2009;

the decision to give notice of the application to the Russian Government (“the Government”);

the parties’ observations;

Having deliberated in private on 30 June 2020 and 8 November 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. This case concerns the statutory restriction on the unionisation of working inmates.

THE FACTS

2. The applicant federation, the Yakut Republican Trade-Union Federation, is a non-governmental organisation set up in 1991 in the Republic of Sakha (Yakutia), which is a constituent part of the Russian Federation. It was represented before the Court by its chairman, Mr A. Loginov. The Government were represented initially by Mr G. Matyushkin and Mr M. Galperin, former Representatives of the Russian Federation to the European Court of Human Rights, and later by their successor in that office, Mr M. Vinogradov.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. Federal State Establishment Penal Colony no. 7 is a high-security prison located in Yakutsk, 4,900 km east of Moscow. Its inmates work in a sawmill and in prison maintenance jobs. From 1998 to 2002 the applicant

federation's chairman, Mr Loginov, then also a chairman of a human rights board, inspected the prison several times. He considered that the administration underpaid its inmates, overworked them, withheld their disability benefits, neglected workplace safety and covered up accidents. Mr Loginov increased the inmates' awareness of their rights.

5. On 10 January 2006 Parliament amended the rules for State registration of non-profit organisations. As a consequence, convicted prisoners were prevented from being founders or members of public associations (see paragraph 12 below).

6. In February 2006 twenty inmates of Penal Colony no. 7 met in secret from the administration and voted to set up a trade union and have it join the applicant federation. The applicant federation admitted the union as its member.

7. On 18 April 2006 the restriction introduced by Parliament entered into force.

8. Alerted by media reports, in June 2007 the republican prosecutor's office investigated the union and found it unlawful. The prosecutor's office considered that the Code on the Execution of Sentences saw prison work as a method of correction and not a professional activity, that in the eyes of the law inmates shared no industrial or trade interests, and that the amended Public Associations Act barred convicted prisoners from founding or joining associations. For these reasons, the prosecutor's office ordered the applicant federation to expel the union. The applicant federation refused to comply, citing the International Labour Organization (ILO) Convention on the Freedom of Association and Protection of the Right to Organise 1948, which protected unions from government intrusion.

9. The prosecutor's office applied to the courts to invalidate the unionisation. On 21 January 2008 the Yakutsk Town Court rejected that application because the union had been set up before the restriction on inmate associations had entered into force.

10. In August 2008 the prosecutor's office applied to the courts again, this time seeking the union's expulsion from the applicant federation. On 23 September 2008 the Town Court applied the restriction and held for the prosecutor. On 10 November 2008 the Supreme Court of Yakutia upheld that judgment. On 10 December 2008 the applicant federation complied with the judgment and expelled the union from its ranks.

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW

11. Article 30 of the Constitution reads:

“Everyone has the right to association, including the right to form trade unions for the protection of his interests. The freedom of activity of public associations is guaranteed.”

12. Section 19 of the Public Associations Act 1995, as amended on 10 January 2006, reads:

“[The following m]ay not be founders or members of an association:
... person[s] detained after conviction by a court.”

That amendment was part of a legislative package (Federal Law no. 18-FZ), which introduced control over non-profit organisations, in particular, over the consistency between their stated goals and activities (Explanatory Notice to Draft Bill no. 233364-4). The adoption of that amendment was preceded by the following parliamentary debate:

“V.A. Ryzhkov MP: We should not adopt this text ... It is unacceptable that persons serving prison sentences may be prohibited from being founders or members [of associations]. The Constitution only prohibits them from electing or being elected ... Why should we deprive [them] of basic constitutional and civil rights? I think this would be unconstitutional ...

A.M. Makarov MP: It is common sense that ... [convicted prisoners] cannot found non-profit or public organisations. As I see it, [the contrary] would mean that rapists, for example, would be able to [found] paedophile societies. But never mind children ... The Public Associations Act provides rights, which are there to be used, for example, the right to public protest. Where would you expect [convicted prisoners] to hold those protests? In jail?”

13. Section 2 of the Trade Unions Act 1996 reads:

“A trade union is a voluntary association of citizens bound by common industrial and professional interests created to represent them and further their social and employment rights and interests.”

14. The relevant provisions of the Code on the Execution of Sentences 1997 read:

Section 9: Basic methods of correction

“2. The basic methods of correction of convicted persons include ... socially useful work.”

Section 103: Prison work

“1. Convicted prisoners shall work in the places and jobs specified by the prison administration.”

15. In a decision made on an application by a third party, the Constitutional Court upheld the restriction on the unionisation of inmates. The Court found that prison work was not a professional activity and therefore required no protection by unions (no. 31-O, 24 January 2013).

II. COMPARATIVE-LAW MATERIALS

16. An overview of the legislation of thirty-six Council of Europe member States suggests that an absolute legislative ban on prisoners forming and joining trade unions only exists in the Czech Republic and the Slovak Republic. In other member States there is no formal ban, but no explicit recognition in law of prisoners' trade union rights either. That recognition often appears to depend on whether working prisoners can be considered employees under ordinary employment law and the nature of their detention regime. The law and practice in Austria and France clearly show that prisoners are not to be considered employees and thus cannot exercise any trade-union rights. For the same reason, and based on the interpretation of the existing legal framework and practice rather than on clear legal grounds, these rights also appear not to be available to prisoners in a number of other member States, such as Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Montenegro, Portugal, Serbia and Ukraine. Collective defence by prisoners of their labour rights is not allowed in Spain.

17. No restrictive laws or practices exist or have been identified in respect of Armenia, Belgium, Estonia, Finland, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Norway, Poland, Romania, Slovenia and Turkey. Working prisoners may also benefit from trade-union rights in Albania, Georgia and North Macedonia if their work can be considered to fall under general labour law. In the United Kingdom and Luxembourg, protection of prisoners' interests is secured through their associations or representative bodies.

18. It should be noted that there is generally a lack of specific regulation in national law concerning prisoners' trade-union rights, limited case-law (Austria and Germany) and only a few examples from practice. In most member States the issue has not arisen or been tested before the domestic courts. The only example of a prisoners' self-avowed trade union in existence is that of the *Gefangenen-Gewerkschaft/Bundesweite Organisation* in Germany.

19. As regards alternative means of protecting their interests, prisoners can benefit from the general right to freedom of association (for example, in Austria, Germany, Portugal and Spain) or voice their views through special representative bodies (for example, in Belgium, Bulgaria and Norway) or consultation (France). In Bulgaria, a special entity engages in collective bargaining on behalf of prisoners and concludes labour contracts with

employers. Prisoners can also individually protect their employment-related rights and interests by resorting to administrative or judicial remedies (Croatia, Ireland, Romania, Slovenia, Spain and Turkey).

III. INTERNATIONAL INSTRUMENTS

20. The relevant provisions of the ILO Convention on the Freedom of Association and Protection of the Right to Organise adopted in 1948 and ratified by Russia in 1956 read:

Article 2

“Workers ... without distinction whatsoever, shall have the right to establish and ... to join organisations of their own choosing without previous authorisation.”

Article 9

“1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.”

THE LAW

ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

21. The applicant federation complained under Articles 6 and 11 of the Convention about the statutory restriction on inmate unionisation. The complaint falls to be examined only under Article 11, which reads:

“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.”

A. Admissibility

1. *The Government*

22. Referring to national law, case-law and international instruments, the Government argued that the complaint was inadmissible for five reasons.

23. Firstly, it was incompatible with the Convention *ratione materiae*, as the Court’s case-law denied inmates the freedom to associate and thus the freedom to form trade unions (*Bollan v. the United Kingdom* (dec.),

no. 42117/98, ECHR 2000-V, and *McFeeley et al. v. the United Kingdom*, no. 8317/78, Commission decision of 15 May 1980, §§ 114-15, Decisions and Reports 20, p. 44).

24. Secondly, it was incompatible with the Convention *ratione personae*. The applicant federation was not a victim because the restriction affected the inmates' union, which could have applied to the Court itself. The union had never authorised the federation's representative, Mr Loginov, to represent it.

25. Thirdly, the application was anonymous as it did not include the unionists' names.

26. Fourthly, the applicant federation had not exhausted domestic remedies since it could have asked the Constitutional Court to repeal the offending section of the Public Associations Act (*Kronkalns v. Latvia* (dec.), no. 21694/06, §§ 38-39 and 41, 17 September 2013, and *Süßmann v. Germany*, 16 September 1996, § 37, *Reports of Judgments and Decisions* 1996-IV). The Constitutional Court was an available and effective remedy and was in fact the applicant federation's sole recourse against the offending law (*Hesse-Anger and Anger v. Germany* (dec.), no. 45835/99, ECHR 2001-VI). The applicant federation could have also applied for a supervisory review of the judgment of 10 November 2008.

27. Lastly, the complaint was manifestly ill-founded.

2. The applicant federation

28. The applicant federation submitted that by arguing inadmissibility, the Government were working with the administration to discredit the unionists.

3. The Court

29. As to compatibility *ratione materiae* with the Convention, the Court considers that the cases of *Bollan* and *McFeeley* (both cited above) do not support the Government's legal proposition because what they rule out are not inmates' rights of association but the freedom to mix socially. In this connection, the Court reiterates that Article 11 § 1 presents trade-union freedom as one form or a special aspect of freedom of association and that its paragraph 2 does not exclude any occupational group from the scope of that Article (see *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, § 145, ECHR 2013).

30. As to compatibility *ratione personae* with the Convention, the Court reiterates that Article 11 protects both workers and unions (see *The National Association of Teachers in Further and Higher Education v. the United Kingdom*, no. 28910/95, Commission decision of 16 April 1998, unreported). As a worker should be free to join a union, so should the union be free to choose its members (see *Associated Society of Locomotive*

Engineers and Firemen (ASLEF) v. the United Kingdom, no. 11002/05, § 39, 27 February 2007). By extension, as a union should be free to join a federation, so should the federation be free to admit the union.

31. As to the anonymity of the application, the Court notes that it is the federation that is the applicant, not its members (unions), or members' members (unionists). The federation identified itself.

32. As to exhaustion of domestic remedies, the Court considers that neither the Constitutional Court nor the supervisory review were remedies to be pursued for exhaustion purposes (see *Ognevenko v. Russia*, no. 44873/09, 20 November 2018; *Denisov v. Russia* (dec.), no. 33408/03, 6 May 2004; and *Abramyan and Others v. Russia* (dec.), nos. 38951/13 and 59611/13, §§ 97-100, 12 May 2015).

33. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The applicant federation

34. The applicant federation maintained that the prison administration had unduly prevented unionisation.

2. The Government

35. According to the Government, the right to form and join trade unions belonged only to the free. This right arose from the freedom to dispose of one's labour power and choose one's trade, and was hence only relevant to wage earners. Prison work was of a different nature. Known in Russian as "coercion to work" (*привлечение к труду*), it was a legal duty and component of the penal regime. It was governed by public law; inmates did not enter into contracts or bargain collectively and were sanctioned for stoppages. They had no need to unionise because they shared no industrial or professional interests. Their rights were already safeguarded by the prison administration, which was supervised by the Prison Service, public prosecutors, the courts, local authorities, ombudsmen, international bodies and trustee boards. Besides, unions might undermine prison discipline and prompt inmates to voice demands and seek privileges for their leaders to the detriment of correction.

3. The Court's assessment

(a) Whether there was a restriction on the right to form and to join a trade union

36. The Court considers that the order by the Yakutsk Town Court of 23 September 2008, which obliged the applicant federation to expel the

trade union, restricted the applicant federation's right under Article 11 of the Convention.

(b) Whether that restriction was prescribed by law

37. The Court considers that that restriction was prescribed by law, in particular the Public Associations Act 1995 and the Trade Unions Act 1996 (see paragraphs 12 and 13 above).

(c) Whether the restriction served a legitimate aim

38. The Court considers that, like prisoners' other Convention rights, their right to form and to join trade unions may be restricted on the grounds of security, in particular for the prevention of crime and disorder (see, *mutatis mutandis*, *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 69, ECHR 2005-IX).

(d) Whether that restriction was necessary in a democratic society

39. The Court reiterates that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention; they continue to enjoy the right to respect for family life; the right to freedom of expression; the right to practise their religion; the right of effective access to a lawyer or to a court for the purposes of Article 6; the right to respect for correspondence; and the right to marry. There is no question, therefore, of a prisoner forfeiting his Convention rights merely because of his status as a person detained following conviction (*ibid.*, §§ 69-70).

40. The Court also reiterates that trade-union freedom is an essential element of social dialogue between workers and employers, and hence an important tool in achieving social justice and harmony (see *Sindicatul "Păstorul cel Bun"*, cited above, § 130).

41. A democratic society may place restrictions on trade unions only for convincing and compelling reasons. The Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the appropriate provision of the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 119, ECHR 2008, with further references).

42. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the high degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide

margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members may be secured (see *Sindicatul "Păstorul cel Bun"*, cited above, § 133).

43. Although the Convention does not precisely define the concept of "trade union" beyond a general indication that it is an association formed for the purpose of defending the interests of its members, most of the cases considered by the Court have concerned employees and, more broadly, persons in an "employment relationship" (see *Manole and "Romanian Farmers Direct" v. Romania*, no. 46551/06, § 59, 16 June 2015).

44. Turning to the circumstances of the present case, the Court agrees with the Government that prison work cannot be equated with employment. Indeed, as the Court has previously noted, prison work differs from the work performed by ordinary employees in many aspects. It serves the primary aim of rehabilitation and resocialisation, is aimed at reintegration and is obligatory (see *Stummer v. Austria* [GC], no. 37452/02, §§ 93-94, ECHR 2011). A similar view has been expressed by the Russian Constitutional Court (see paragraph 15 above).

45. It is true that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32). However, trade-union freedom may be difficult to exercise in detention. Nevertheless, the Court reiterates that the Convention is a "living instrument" (see *Demir and Baykara*, cited above, § 146) and it may well be, therefore, that developments in that field may at some point in future necessitate the extension of trade-union freedom to working inmates, especially if they work for a private employer (see *Stummer*, cited above, § 94). Indeed, paragraph 2 of Article 11 does not exclude any occupational group from the scope of that Article. At most, the national authorities are entitled to impose "lawful restrictions" on certain of their employees in accordance with Article 11 § 2 (see *Sindicatul "Păstorul cel Bun"*, cited above, § 145).

46. However, having regard to the current practice of the member States of the Council of Europe (see paragraphs 16–19 above), it appears that there is not a sufficient consensus to interpret Article 11 in the manner advocated by the applicant federation.

47. In conclusion, the Court considers that the domestic courts' order to the applicant federation to expel the union of working inmates did not exceed the margin of appreciation available to the national authorities in this sphere, and that the restriction complained of was therefore necessary in a democratic society within the meaning of the second paragraph of Article 11.

48. There has, accordingly, been no violation of Article 11 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by five votes to two, that there has been no violation of Article 11 of the Convention.

Done in English, and notified in writing on 7 December 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Georgios A. Serghides
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint separate opinion of Judges Serghides and Lemmens is annexed to this judgment.

G.A.S.
M.B.

JOINT DISSENTING OPINION OF JUDGES LEMMENS
AND SERGHIDES

1. To our regret we are unable to join the majority. In our opinion, there has been a violation of Article 11 of the Convention.

2. This case concerns an order to expel the trade union formed by a number of inmates in a high-security prison in Yakutsk from the applicant federation of trade unions. The order was issued by the Yakutsk Town Court, on the basis of section 19 of the Public Associations Act 1995. That provision prevents detainees from founding or being members of an association.

We will concentrate on whether the expulsion order can be considered “necessary in a democratic society”.

3. The majority start their analysis by recalling two principles:

- prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, save for the right to liberty (see paragraph 39 of the judgment); indeed, as the Court has stated, “the Convention cannot stop at the prison gate” (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 836, 25 July 2013, and *Klibisz v. Poland*, no. 2235/02, § 354, 4 October 2016);

- restrictions on trade-union freedom must be based on “convincing and compelling reasons” (see paragraph 41 of the judgment, referring to *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 119, ECHR 2008).

We also adhere to these principles.

4. The majority basically argue that prison work cannot be equated with ordinary employment (see paragraph 44 of the judgment), and that while it may be necessary in the future to extend trade-union freedom to working inmates (see paragraph 45 of the judgment), the time is currently not yet ripe to interpret Article 11 of the Convention in such a manner (see paragraph 46 of the judgment).

We find this reasoning to be based more on policy grounds than on legal grounds. Moreover, we find that the conclusion reached by the majority cannot be justified on legal grounds.

5. Of course, we are not blind to the realities of prison life. Allowing prisoners to join a trade union (or any association, for that matter) and to develop trade-union activities could lead to situations contrary to prison discipline, and even give rise to disorder. We have no difficulty in accepting that the competent authorities are entitled to regulate the activities of associations formed by inmates. It is, for instance, perfectly legitimate to prohibit collective actions that might seriously jeopardise security or order in prisons.

But that is not what this case is about. The impugned interference concerns a total ban on trade unions in a prison context. As the Court has held, the permissible exceptions to the right to freedom of association must

be narrowly interpreted (see, among other authorities, *Sidiropoulos and Others v. Greece*, no. 26695/95, § 38, *Reports of Judgments and Decisions* 1998-IV), so as to give practical and effective protection to that freedom (see *Demir and Baykara*, cited above, § 146, and *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway*, no. 45487/17, § 96, 10 June 2021). A total ban goes against this principle of effectiveness (for an application, see *Demir and Baykara*, cited above, §§ 125-27).

6. We are unable to identify the “convincing and compelling reasons” that could justify such a total ban. We do not even see any reasons that could be considered (merely) sufficient to justify a total ban.

Any restriction on freedom of association, including trade-union freedom, and even in a prison context, must strike a fair balance between the rights of the individuals concerned and the general interest pursued by the public authorities. In our opinion, it has not been demonstrated in the present case that the balance struck was a fair one.

7. With regard to the rights of the inmates concerned, we consider that, as persons in custody, they are in a vulnerable position (see *Salman v. Turkey* [GC], no. 21986/93, § 99, ECHR 2000-VII), and that this applies to their working conditions. As chairman of a human rights board, the president of the applicant federation had indicated, after several visits to the prison, “that the administration underpaid its inmates, overworked them, withheld their disability benefits, neglected workplace safety and covered up accidents” (see paragraph 4 of the judgment). We cannot express an opinion on whether or not these accusations were well founded. It suffices to note that such complaints are not unusual and that they can be arguable. Indeed, the Court has been confronted with prison-work related complaints from inmates in other prisons (see, among other authorities, *Georgiev v. the former Yugoslav Republic of Macedonia*, no. 26984/05, §§ 69-75, 19 April 2012, and *Niculescu v. Romania*, no. 25333/03, §§ 65-73, 25 June 2013). The European Committee of Social Rights has also drawn attention to the need for a proper regulation of prisoners’ working conditions, particularly with respect to work carried out for employers other than the prison service itself (see *Conclusions 2012*, General Introduction, Statement of Interpretation on Article 1 § 2; included in the *Digest of the case-law of the European Committee of Social Rights*, 2018, p. 61, <http://rm.coe.int/0900001680939f80>).

There is therefore, in our opinion, room for protection of the social rights of working inmates. Given their vulnerable position, prisoners may even have a strong interest in securing respect for their right to join an association that defends their individual and collective rights. The Court has held that trade-union freedom can be “an essential element of social dialogue between workers and employers, and hence an important tool in achieving social justice and harmony” (see *Sindicatul “Păstorul cel Bun” v. Romania*

[GC], no. 2330/09, § 130, ECHR 2013, quoted in paragraph 40 of the present judgment). There is no reason why this would not apply, as a matter of principle, in a prison context. Even if the dialogue engaged will be different when there is a special relationship of authority, as in a prison situation, it should not be excluded as a means of achieving or promoting “social justice and harmony”.

8. With regard to the general interest pursued by the public authorities, in our opinion the mere fact that working conditions for prisoners are different to those for ordinary workers (see *Stummer v. Austria* [GC], no. 37452/02, § 93, ECHR 2011, cited in paragraph 44 of the present judgment) cannot in itself be a sufficient reason for banning prisoners from forming or joining a trade union. As acknowledged by the majority, Article 11 § 2 of the Convention does not exclude any occupational group from the scope of that provision (see paragraph 29 of the judgment); at most, the national authorities are entitled to impose “lawful restrictions” on certain of their employees in accordance with Article 11 § 2 (see *Sindicatul “Păstorul cel Bun”*, cited above, § 145; *Manole and “Romanian Farmers Direct” v. Romania*, no. 46551/06, § 62, 16 June 2015; and *Ognevenko v. Russia*, no. 44873/09, § 59, 20 November 2018).

It is not clear whether the Government invoke any of the particular aims listed in Article 11 § 2 of the Convention (see paragraph 35 of the judgment). Be that as it may, the majority accept the prevention of crime and disorder as justification for the ban (see paragraph 38 of the judgment). However, a general reference to the need for prevention of crime and disorder, without a concrete assessment of the risks posed by trade-union activities in the relevant prison, does not allow conclusions to be drawn regarding the weight to be attached to that general interest. We further note that by imposing a general and indiscriminate ban on trade unions for detained persons, section 19 of the Public Associations Act 1995 does not allow for any assessment of whether a less drastic measure could achieve the same legitimate aim of preventing crime or disorder (compare *Roman Zakharov v. Russia* [GC], no. 47143/06, § 260, ECHR 2015).

9. We are not therefore convinced that a fair balance has been struck. In order for the Court to come to the conclusion that the impugned ban was “necessary”, a more precise demonstration would have to be made by the Government. We consider that the latter failed to satisfy the burden of providing sufficient justification.

10. The majority seem to be well aware that the interference complained of is at odds with the applicant federation’s right to freedom of association. However, they rely on a perceived lack of consensus among the member

States of the Council of Europe¹ to defer the finding of a violation of Article 11 to a later date (see paragraphs 45-46 of the judgment).

It is ironic that they concurrently refer to the fact that Convention rights are intended to be practical and effective, and that the Convention is a living instrument (see paragraph 45 of the judgment). We agree with linking the living-instrument doctrine to the principle of effectiveness. To our regret, however, we cannot agree with the majority's next step, which seems in our opinion to be quite the opposite of what is entailed by the said principle and doctrine: in reality, the majority reduce trade-union freedom to a theoretical and illusory right for a specific group of workers, and reduce Article 11 of the Convention, for these workers, to a sleeping beauty, asleep until it may be awakened by a substantial group of member States.

We find this approach too restrictive. We can of course understand very clearly the policy reasons behind the majority's approach. But there is a point where the law (the Convention) is stronger than policy. *Dura lex sed lex*. Where a law, a practice or a decision is not compatible with the Convention, or where the Government do not at least provide the necessary justification, it is for the Court to assume its responsibilities and to rule to that effect. The emergence of a consensus among the member States of the Council of Europe may act as an incentive for the Court to adopt a dynamic interpretation of the Convention, but the lack of such a consensus – or the perceived lack of a consensus² – should not act as an obstacle to an interpretation, dynamic or not, that is warranted on other grounds.

11. In conclusion, it is clear that the domestic authorities enjoy a margin of appreciation with respect to the regulation of the exercise of trade-union freedom in prisons. They are entitled to restrict trade-union activities, provided that they can rely on relevant and sufficient reasons and that the restriction is not disproportionate. All that is beyond any doubt.

The majority conclude that the order to expel the union of working inmates from the trade-union federation did not exceed the margin of appreciation available to the national authorities (see paragraph 47 of the judgment).

However, the judgment contains a warning that the matter is not settled once and for all.

While we appreciate that warning, we regret that the majority do not send a stronger message to the Russian authorities. We believe, on the basis of

¹ We will not discuss whether or not there is indeed a lack of consensus. We would, however, like to draw attention to the fact that only two States, the Czech Republic and the Slovak Republic, have an absolute ban on prisoners forming and joining trade unions (see paragraph 16 of the judgment). It seems to us that in most of the other States the situation with respect to the possibility of forming and joining trade unions is at best unclear, and we would have preferred the majority to be more cautious in their "interpretation" of the existing legal framework and practice (*ibid.*).

² See footnote 1.

YAKUT REPUBLICAN TRADE-UNION FEDERATION v. RUSSIA JUDGMENT –
SEPARATE OPINION

the elements in the file, that the necessity of a general and indiscriminate ban has not been demonstrated, and that Article 11 has therefore been violated.