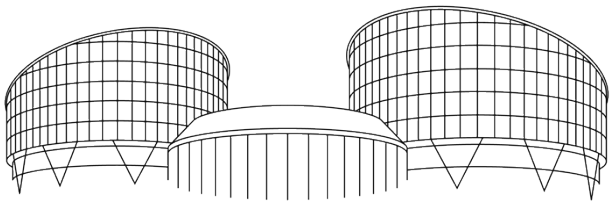

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF REDFEARN v. THE UNITED KINGDOM

(Application no. 47335/06)

JUDGMENT

STRASBOURG

6 November 2012

FINAL

06/02/2013

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

In the case of Redfearn v. the United Kingdom,

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Nicolas Bratza,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Vincent A. De Gaetano, *judges,*

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 16 October 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 47335/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Arthur Collins Redfearn ("the applicant"), on 16 November 2006.

2. The applicant was represented by Mr P. Chapman of Mitchells Solicitors, a lawyer practising in York. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office.

3. The applicant complained, among other things, that he had been dismissed on account of his political views and membership of a political party.

4. On 7 January 2009 the Acting President of the Fourth Section decided to communicate the complaints concerning Articles 10, 11 and 14 of the Convention to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Bradford.

6. The applicant was employed by Serco Limited ("Serco") from 5 December 2003 to his dismissal on 30 June 2004. Serco provided transport to local authorities, including Bradford City Council.

7. The applicant, who is white British, was employed formerly as a driver's escort and latterly as a driver. As such, he was responsible for transporting children and adults with physical and/or mental disabilities within the Bradford area. The majority of his passengers were Asian in origin. There had been no complaints about his work or his conduct at work and his supervisor, who was of Asian origin, had nominated him for the award of "first-class employee".

8. On 26 May 2004 a local newspaper article published in Bradford and the surrounding areas identified the applicant as a candidate for the British National Party ("the BNP") in the forthcoming local elections. On the same day, the applicant was temporarily assigned to deliver mail to local council offices.

9. At the relevant time the BNP only extended membership to white nationals. According to its constitution it was:

> "wholly opposed to any form of integration between British and non-European peoples. It is therefore committed to stemming and reversing the tide of non-white immigration and to restoring, by legal changes, negotiation and consent, the overwhelmingly white makeup of the British population that existed in Britain prior to 1948."

10. On 27 May 2004 UNISON, the public sector workers' trade union, sent a letter to Serco stating that many of its members found the applicant's continued employment a "significant cause for concern, bearing in mind the BNP's overt and racist/fascist agenda." The letter advised Serco that 70-80 percent of its customer base and 35 percent of its workforce were of Asian origin. UNISON asked that Serco take immediate action to ensure its members were not subjected to racial hatred. Another trade union, GMB, and a number of employees also made representations to Serco about the applicant's continued employment.

11. On 15 June 2004 the applicant was elected as a local councillor for the BNP. After taking legal advice Serco summarily dismissed him on 30 June 2004. Serco cited, *inter alia*, potential health and safety risks as the applicant's continued employment would give rise to considerable anxiety among passengers and their carers. It also expressed concern that the applicant's continued employment could jeopardise its reputation and possibly lead to the loss of its contract with Bradford City Council.

12. Ordinarily, one year's service is required before an employee can bring an action for unfair dismissal under the Employment Rights Act 1996 ("the 1996 Act"), although this qualifying period does not apply where the dismissal was on grounds of pregnancy, race, sex or religion. The applicant therefore lacked sufficient continuous service to bring an action for unfair dismissal. However, on 12 August 2004 he lodged a statutory claim of race

discrimination in the Employment Tribunal pursuant to the Race Relations Act 1976 ("the 1976 Act").

13. The applicant claimed that he had been unlawfully discriminated against as his dismissal constituted less favourable treatment on racial grounds. The racial grounds relied on were those of the passengers and employees of Serco who were of Asian origin. He further argued that since the BNP was a "whites-only" party, his dismissal also constituted indirect racial discrimination.

14. The Employment Tribunal gave judgment on 2 February 2005. It noted Serco's concerns that the applicant's continued employment might lead to difficulties with other employees; damage its relationship with the unions; lead to attacks on Serco's minibuses which would jeopardise the health and safety of Serco's staff, its vulnerable passengers, and the applicant himself; cause considerable anxiety amongst Serco's passengers and those relatives/carers entrusting vulnerable passengers to its care; and damage its reputation so as potentially to place at risk existing contracts and future bids for work in the public sector and elsewhere.

15. The Employment Tribunal dismissed the claim of direct discrimination as it was satisfied that if any discrimination existed against the claimant it was not on racial grounds but rather on health and safety grounds. The Tribunal also dismissed the claim of indirect discrimination on the ground that the applicant's dismissal was a proportionate means of achieving a legitimate aim, namely the maintenance of health and safety.

16. The applicant lodged an appeal with the Employment Appeal Tribunal. On 27 July 2005 his appeal was upheld on the ground that the Tribunal had erred in its construction of the phrase "on racial grounds" by failing to interpret its meaning broadly and had not indicated how it had come to the conclusion that the applicant's dismissal was a proportionate means of achieving the aim of ensuring health and safety because, *inter alia*, there had been no consideration of any alternatives to dismissal.

17. On 9 September 2005 Serco was granted permission to appeal to the Court of Appeal.

18. On 25 May 2006 the Court of Appeal allowed Serco's appeal and restored the order of the Employment Tribunal. Mummery LJ found the applicant's submission that he had been subjected to direct race discrimination to be wrong in principle and inconsistent with the purposes of the legislation.

19. In rejecting the claim of direct discrimination, the Court of Appeal noted that:

> "Mr Redfearn was treated less favourably not on the ground that he was white, but on the ground of a particular non-racial characteristic shared by him with a tiny proportion of the white population, that is membership of and standing for election for a political party like the BNP. Serco was not adopting a policy which discriminated on the basis of a dividing line of colour or race. Serco would apply the same approach to a member of a similar political party, which confined its membership to black people.

> The dividing line of colour or race was not made by Serco, but by the BNP which defines its own composition by colour or race. Mr Redfearn cannot credibly make a claim of direct race discrimination by Serco against him on the ground that he is white by relying on the decision of his own chosen political party to limit its membership to white people. The BNP cannot make a non-racial criterion (party membership) a racial one by the terms of its constitution limiting membership to white people. Properly analysed Mr Redfearn's complaint is of discrimination on political grounds, which falls outside the anti-discrimination laws."

20. In rejecting the claim of indirect discrimination, the following was noted:

> "For indirect discrimination ... it is necessary to identify a 'provision, criterion or practice' which Serco has applied or would apply equally to persons not of the same race or colour. ... Mr Redfearn ... failed to present the tribunal with a case, which satisfied the requisite elements of a claim for indirect race discrimination and upon which the tribunal could properly make a finding of indirect race discrimination....
>
> The employment tribunal appears to have attempted itself a version of a 'provision, criterion or practice' in paragraph 5.6 of its decision (see paragraph 28 above). However, it is formulated too narrowly (membership of the BNP) to be meaningful. A provision of 'membership of the BNP' could not be applied to a person who was not of the same colour as Mr Redfearn, because only persons of the same colour as him (white) are eligible to be members of the BNP. A more general and meaningful provision along similar lines would be one applying to membership of a political organisation like the BNP, which existed to promote views hostile to members of a different colour than those that belonged to the organisation. If such a provision were applied, however, it would not put persons of the same race as Mr Redfearn 'at a particular disadvantage' when compared with other persons within section 1(1A) of the 1976 Act. All such political activists would be at the same disadvantage, whatever colour they were."

21. Lastly, with regard to the applicant's contention that he had been subjected to less favourable treatment arising from membership of a political party contrary to his Convention rights under Articles 9, 10, 11 and 14 and that this should have been taken into account in deciding whether indirect discrimination had been justified, the Court of Appeal stated that:

> "The 1998 Act does not assist Mr Redfearn in this case. He is not entitled to make a claim under it as Serco is not a public authority. Section 3 of the 1998 Act does not assist, as there is no respect in which the relevant provisions of the 1976 Act are incompatible with the Convention rights. As for justification under the 1976 Act I have already explained that it does not arise, as no case of indirect discrimination has been made out."

22. The applicant was refused leave to appeal to the House of Lords.

II. RELEVANT DOMESTIC LAW

A. The Employment Rights Act 1996

23. Under section 94(1) of the Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer. By section 98(1), an employer must show a reason for a dismissal falling within a category set out in section 98(2), which includes "conduct" or "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".

Section 98(4) deals with fairness:

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

24. However, paragraph 106 provides as follows:

> "(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination."

25. Section 108(3) of the Employment Rights Act provides a wide variety of exceptions from the one-year qualifying period, many of which derive from the United Kingdom's implementation of European Community legislation in the field of employment. These exceptions include situations in which an employee has been dismissed on grounds of pregnancy or taking parental leave, refusing to comply with a requirement imposed in contravention of the Working Time Regulations 1998, or where the employee has made a public interest disclosure against the employer. Moreover, applicants alleging that they were dismissed on account of their race, sex or religion are also exempt from the one-year qualifying period.

B. The Race Relations Act 1976

26. Section 1 (1) (1) of the Race Relations Act 1976 states the following:

> "A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if-
>
> (a) on racial grounds he treats that other less favourably than he treats or would treat other persons."

Section 1 A of the Race Relations Act 1976 states:

> " A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in subsection (IB), he applies to that other provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but
>
> (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons;
>
> (b) which puts that other at that disadvantage, and
>
> (c) which he cannot show to be a proportionate means of achieving a legitimate aim."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 10 AND 11 OF THE CONVENTION

27. The applicant complained of a violation of his rights under Articles 10 and 11 of the Convention. He submitted that, in choosing to become a member of the BNP and to stand for election, he was engaging both his right to freedom of expression pursuant to Article 10 of the Convention and his right to freedom of assembly and association pursuant to Article 11 and that his dismissal had disproportionately interfered with his exercise of those rights.

28. Article 10 of the Convention provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

29. Article 11 provides as follows:

"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."

30. The Government contested these arguments.

A. Admissibility

31. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

32. As the Court has noted, the applicant relies on both Article 10 and Article 11 of the Convention. However, the Court considers it more appropriate to examine his complaints under Article 11 of the Convention, but it will do so in the light of Article 10.

1. The parties' submissions

(a) The applicant

33. The applicant submitted that for an employee to lose his job for exercising his right to freedom of association struck at the "very substance" of that right. Consequently, he contended that the Government had a positive obligation under Article 11 of the Convention to enact legislation which would have afforded him protection from the termination of his employment by Serco on the ground of his involvement with the BNP. However, since he had less than one year's qualifying service, he was unable to bring a claim for unfair dismissal under the Employment Rights Act 1996.

34. The applicant submitted that fundamental rights must be effective and available from the first day of employment. While he understood that it might be appropriate to allow an employer a certain time in which to assess the conduct or capability of an employee, he argued that this should not apply in relation to discrimination on protected grounds. In fact, he

submitted that freedom of association would be illusory if it could only be exercised after a certain period of service.

35. The applicant further submitted that even if he had had more than one year's qualifying service, his employer would have been able to rely on his political involvement as being "some other substantial reason" to justify the termination of his employment.

(b) The Government

36. The Government contended that Article 11 did not impose any positive obligation to enact legislation of the kind suggested by the applicant. They submitted that in assessing the extent, if any, of the State's positive obligation, the Court should consider whether the nature of the interference struck at the "very substance" of the right or freedom concerned (*Young, James and Webster v. the United Kingdom*, 13 August 1981, § 55, Series A no. 44, *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, § 54, ECHR 2006-I). However, it did not necessarily follow from the fact that someone was dismissed from their employment as a consequence of manifesting certain political views that there would be an interference with their rights under Article 11 which struck at the very substance of the right so as to engage the State's positive obligation. In this regard the Government relied, by analogy, on *Stedman v the United Kingdom*, application no. 29107/95, decision of 9 April 1997, in which the Commission rejected as inadmissible a complaint under Article 9 of the Convention by a Christian applicant who had been dismissed because she refused to work on Sundays. The Commission noted that there had been no pressure on the applicant to change her religious views or to prevent her from manifesting her religion or beliefs. It followed that the Government could not be expected "to have legislation that would protect employees against such dismissals by private employers".

37. In the alternative, the Government contended that if a positive obligation existed, it was satisfied by the provisions of the 1996 Act. The Government submitted that in the United Kingdom, where the qualifying period of one year's service has been accrued, the 1996 Act would generally afford protection against dismissal on the grounds of political involvement, unless the employer could demonstrate that the involvement related to the capacity of the employee for performing the work in question or constituted "some other substantial reason" for the dismissal (see section 98(2) of the 1996 Act). If an employer was able to identify one of these two criteria, a fact-sensitive balancing exercise would have to be carried out. However, there was nothing to suggest that such a balancing exercise would be incompatible with the qualified rights under Article 11.

38. Finally, the Government submitted that the one-year qualifying period which an employee must serve before statutory protection is obtained in relation to dismissal pursued a legitimate aim, namely the creation of

greater employment opportunities by encouraging companies to recruit. Indeed, in the case of *R v. Secretary of State for Employment ex parte Seymour-Smith and Another* [2000] UKHL 12 the House of Lords held that it was reasonable of the Secretary of State to consider that the risks of unjustified involvement with tribunals in unfair dismissal cases and the cost of such involvement could deter employers from giving more people jobs. Consequently, the Government submitted that the one-year qualifying period could not be said to fall outside the State's margin of appreciation.

(c) The Third Party Intervener: The Equality and Human Rights Commission

39. The Equality and Human Rights Commission ("the Commission") submitted that even if the applicant had been employed in the public sector, his dismissal would have been justified as it was clear that a State could lawfully place restrictions on the freedom of association of employees where it was necessary in a democratic society, for example to protect the rights of others or to maintain the political neutrality of civil servants (*Van der Heijden v. the Netherlands*, app. no. 11002/84, 8 March 1985 and *Kern v. Germany*, app. no. 26870/04, 29 May 2007). The question whether a dismissal would breach Article 11 turned on a number of factors, including the role of the employee, the degree of contact he or she had with the public and whether or not it involved public trust and confidence, whether the employee had direct contact with or provided services to individuals against which the relevant group or party had expressed hostility, the extent of his involvement with the party or group, the effect his continued employment would have on the employer's reputation, and the employee's conduct during the period of employment.

40. In the Commission's view, a worker's active membership of a party such as the BNP, if it became public, would impact on the employer's provision of services regardless of whether or not there were any complaints about the manner in which he did his job. The fact that the applicant was in direct contact with services users, a significant proportion of whom were of an ethnic or religious group towards which the BNP had expressed hostility, would render any interference with his rights under Article 11 proportionate.

41. Moreover, the Commission submitted that to require disabled Asian adults and Asian parents of disabled children to entrust themselves or their children to an elected BNP official in order to utilise public authority transport services would threaten to breach the rights of those service users. In this regard, the Commission noted that service providers were obliged to comply with the 1976 Act which prohibited race discrimination and racial harassment against employers and service users.

2. The Court's assessment

42. Although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, the national authorities may in certain circumstances be obliged to intervene in the relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the right to freedom of association (see, *mutatis mutandis*, *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, §§ 32-34, Series A no. 139, *Gustafsson v. Sweden*, 25 April 1996, § 45, *Reports of Judgments and Decisions* 1996-II, and *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000).

43. Therefore, although the matters about which the applicant complained did not involve direct intervention or interference by the State, the United Kingdom's responsibility will be engaged if these matters resulted from a failure on its part to secure to the applicant under domestic law his right to freedom of association. In other words there is also a positive obligation on the authorities to provide protection against dismissal by private employers where the dismissal is motivated solely by the fact that an employee belongs to a particular political party (or at least to provide the means whereby there can be an independent evaluation of the proportionality of such a dismissal in the light of all the circumstances of a given case).

44. The Court has recognised that in certain circumstances an employer may lawfully place restrictions on the freedom of association of employees where it is deemed necessary in a democratic society, for example to protect the rights of others or to maintain the political neutrality of civil servants (see, for example, *Ahmed and Others v. the United Kingdom*, 2 September 1998, § 63, *Reports of Judgments and Decisions* 1998-VI). In view of the nature of the BNP's policies (see paragraph 9, above), the Court recognises the difficult position that Serco may have found itself in when the applicant's candidature became public knowledge. In particular, it accepts that even in the absence of specific complaints from service users, the applicant's membership of the BNP could have impacted upon Serco's provision of services to Bradford City Council, especially as the majority of service users were vulnerable persons of Asian origin.

45. However, regard must also be had to the fact that the applicant was a "first-class employee" (see paragraph 7, above) and, prior to his political affiliation becoming public knowledge, no complaints had been made against him by service users or by his colleagues. Nevertheless, once he was elected as a local councillor for the BNP and complaints were received from unions and employees, he was summarily dismissed without any apparent consideration being given to the possibility of transferring him to a non-customer facing role. In this regard, the Court considers that the case can readily be distinguished from that of *Stedman v. the United Kingdom*

(cited above), in which the applicant was dismissed because she refused to work the hours required by the post. In particular, the Court is struck by the fact that these complaints, as summarised in paragraph 10, were in respect of prospective problems and not in respect of anything that the applicant had done or had failed to do in the actual exercise of his employment.

46. Moreover, although the applicant was working in a non-skilled post which did not appear to have required significant training or experience (compare, for example, *Vogt v. Germany*, 26 September 1995, Series A no. 323, and *Pay v. the United Kingdom*, no. 32792/05, 16 September 2008), at the date of his dismissal he was fifty-six years old and it is therefore likely that he would have experienced considerable difficulty finding alternative employment.

47. Consequently, the Court accepts that the consequences of his dismissal were serious and capable of striking at the very substance of his rights under Article 11 of the Convention (*Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, §§ 61 and 62, ECHR 2006-I and *Young, James and Webster v. the United Kingdom*, cited above, § 55). The Court must therefore determine whether in the circumstances of the applicant's case a fair balance was struck between the competing interests involved, namely the applicant's Article 11 right and the risk, if any, that his continued employment posed for fellow employees and service users. It is also to be borne in mind that what the Court is called upon to do in this case is not to pass judgment on the policies or aims, obnoxious or otherwise, of the BNP at the relevant time (the BNP is, in any case, not a party to these proceedings), but solely to determine whether the applicant's rights under Article 11 were breached in the particular circumstances of the instant case. In this connection it is also worth bearing in mind that, like the *Front National-Nationaal Front* in *Féret v. Belgium* (no. 15615/07, 16 July 2009) the BNP was not an illegal party under domestic law nor were its activities illegal (see, by way of contrast, *Hizb Ut-Tahrir and Others v. Germany* (dec.) no. 31098/08, 12 June 2012).

48. The Court has accepted that Contracting States cannot guarantee the effective enjoyment of the right to freedom of association absolutely (*Plattform "Ärzte für das Leben" v. Austria*, cited above, § 34). In the context of the positive obligation under Article 11, it has held that where sensitive social and political issues are involved in achieving a proper balance between the competing interests and, in particular, in assessing the appropriateness of State intervention, the Contracting States should enjoy a wide margin of appreciation in their choice of the means to be employed (*Gustafsson v. Sweden*, cited above, § 45).

49. Therefore, the principal question for the Court to consider is whether, bearing in mind the margin of appreciation afforded to the respondent State in this area, the measures taken by it could be described as "reasonable and appropriate" to secure the applicant's rights under

Article 11 of the Convention (see, *mutatis mutandis*, *Plattform "Ärzte für das Leben" v. Austria*, cited above, §§ 32 – 34, *Gustafsson v. Sweden*, cited above, § 45, and *Fuentes Bobo v. Spain*, cited above, § 38).

50. In the opinion of the Court, a claim for unfair dismissal under the 1996 Act would be an appropriate domestic remedy for a person dismissed on account of his political beliefs or affiliations. Once such a claim is lodged with the Employment Tribunal, it falls to the employer to demonstrate that there was a "substantial reason" for the dismissal. Following the entry into force of the Human Rights Act 1998, the domestic courts would then have to take full account of Article 11 in deciding whether or not the dismissal was, in all the circumstances of the case, justified.

51. However, as the applicant had not been employed for the one-year qualifying period at the date of his dismissal, he was unable to benefit from this remedy. He therefore brought a race discrimination claim under the 1976 Act but this claim was rejected by the Court of Appeal, which found that he had not been discriminated against on account of his race. The Court observes that the 1976 Act is concerned only with direct and indirect race discrimination. Although it would not go so far as to state that it amounted to a wholly ineffective remedy – indeed, it recalls that the applicant's claim succeeded before the Employment Appeal Tribunal – the Court considers that the 1976 Act was not primarily intended to cover a situation such as the present one and a liberal interpretation of the relevant provisions was required in order for the domestic courts to find in the applicant's favour. Consequently, the Court does not consider that the 1976 Act offered the applicant any protection against the interference with his rights under Article 11 of the Convention.

52. There is therefore no doubt that the applicant suffered a detriment as a consequence of the one-year qualifying period as it deprived him of the only means by which he could effectively have challenged his dismissal at the domestic level on the ground that it breached his fundamental rights. It therefore falls to the Court to consider whether the respondent State, in including the one-year qualifying period in the 1996 Act, could be said to have taken reasonable and appropriate measures to protect the applicant's rights under Article 11.

53. The Court observes that the one-year qualifying period was included in the 1996 Act because the Government considered that the risks of unjustified involvement with tribunals in unfair dismissal cases and the cost of such involvement could deter employers from giving more people jobs. Thus, the purpose of the one-year qualifying period was to benefit the domestic economy by increasing labour demand. The Court has received no submissions on the length of the qualifying period but it accepts that one year would normally be a sufficient period for an employer to assess the suitability of an employee before he or she became well-established in a

post. Consequently, in view of the margin of appreciation afforded to Contracting States in formulating and implementing social and economic policies, the Court considers that it was in principle both reasonable and appropriate for the respondent State to bolster the domestic labour market by preventing new employees from bringing unfair dismissal claims.

54. However, it observes that in practice the one-year qualifying period did not apply equally to all dismissed employees. Rather, a number of exceptions were created to offer additional protection to employees dismissed on certain prohibited grounds, such as race, sex and religion, but no additional protection was afforded to employees who were dismissed on account of their political opinion or affiliation.

55. The Court has previously held that political parties are a form of association essential to the proper functioning of democracy (*United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 25, *Reports of Judgments and Decisions* 1998-I). In view of the importance of democracy in the Convention system, the Court considers that in the absence of judicial safeguards a legal system which allows dismissal from employment solely on account of the employee's membership of a political party carries with it the potential for abuse.

56. Even if the Court were to acknowledge the legitimacy of Serco's interest in dismissing the applicant from its workforce having regard to the nature of his political beliefs, the policies pursued by the BNP and his public identification with those policies through his election as a councillor, the fact remains that Article 11 is applicable not only to persons or associations whose views are favourably received or regarded as inoffensive or as a matter of indifference, but also those whose views offend, shock or disturb (see, *mutatis mutandis*, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and *Jersild v. Denmark*, 23 September 1994, § 37, Series A no. 298). For the Court, what is decisive in such cases is that the domestic courts or tribunals be allowed to pronounce on whether or not, in the circumstances of a particular case, the interests of the employer should prevail over the Article 11 rights asserted by the employee, regardless of the length of the latter's period of employment.

57. Consequently, the Court considers that it was incumbent on the respondent State to take reasonable and appropriate measures to protect employees, including those with less than one year's service, from dismissal on grounds of political opinion or affiliation, either through the creation of a further exception to the one-year qualifying period or through a free-standing claim for unlawful discrimination on grounds of political opinion or affiliation. As the United Kingdom legislation is deficient in this respect, the Court concludes that the facts of the present case give rise to a violation of Article 11 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

58. The applicant also alleged that his dismissal gave rise to a breach of Article 9 of the Convention. Article 9 provides as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

59. The Court has examined this complaint but finds, in the light of all the material in its possession and in so far as the matters complained of are within its competence, that it does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

60. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

61. The applicant further complained that he had been denied access to an effective remedy in respect of his Convention complaints. Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

62. The Court reiterates its case-law to the effect that Article 13 does not require the law to provide an effective remedy where the alleged violation arises from primary legislation (see *James and Others v. the United Kingdom*, 21 February 1986, § 85, Series A no. 98). In any event, the matter raised by the applicant has been adequately addressed in the Court's response to his Article 11 complaint.

63. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ TOGETHER WITH ARTICLES 10 AND 11

64. Lastly, the applicant complained that under United Kingdom legislation, compensation for discrimination on the grounds of sex, race, disability, sexual orientation, religious belief and age is uncapped, whereas there is a statutory limit for unfair dismissal. Moreover, he complained that there was no qualifying period in respect of such discrimination claims.

65. Article 14 of the Convention provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] 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."

66. The Court does not consider the applicant's complaints under Article 14 to be manifestly ill-founded within the meaning of Article 35 §§ 3 of the Convention. It further notes that they are not inadmissible on any other grounds and must, therefore, be declared admissible. However, having regard to its findings under Article 11 (see paragraphs 42 – 57 above), the Court does not find it necessary to examine whether or not there has also been a violation of Article 14 of the Convention read together with Articles 10 and 11.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

68. The applicant did not submit a claim for just satisfaction.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaints concerning Articles 10 and 11 of the Convention alone and in conjunction with Article 14 admissible and the remainder of the application admissible;

2. *Holds* by four votes to three that there has been a violation of Article 11 of the Convention;

3. *Holds* unanimously that it is not necessary to examine whether there has also been a violation of Article 14 of the Convention read together with Articles 10 and 11.

Done in English, and notified in writing on 6 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Lech Garlicki
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Judges Bratza, Hirvelä and Nicolaou is annexed to this judgment.

L.G.
F.A.

JOINT PARTLY DISSENTING OPINION OF JUDGES BRATZA, HIRVELÄ AND NICOLAOU

1. We regret that we are unable to share the view of the majority that there was a violation of Article 11 of the Convention in the present case. In our view, the United Kingdom was not in breach of its obligations under the Article by reason of any failure to protect the applicant against his dismissal from his employment on grounds of his political opinion.

2. Despite differing in the result, there is much in the judgment with which we are in agreement.

(a) As noted in the judgment, the case concerns exclusively the positive obligations of the State to secure through its legal system the rights guaranteed by Article 11. The applicant's employer, Serco, was a private limited company and the applicant's dismissal by the company did not involve any direct intervention or interference on the part of the United Kingdom. The Court has accepted that Contracting States cannot guarantee the effective enjoyment of Article 11 rights absolutely. In assessing whether such positive obligations arise and, if so, to what extent, the Court must determine whether a fair balance was struck within the legal system between the competing interests of the individual and the community as a whole. In a case where sensitive social, economic and political issues are involved, in achieving a proper balance between those interest and, in particular, in assessing the appropriateness of State intervention, the Contracting States enjoy a wide margin of appreciation in the choice of means to be employed.

(b) It is accepted in the judgment that a claim for unfair dismissal under the 1996 Act affords effective protection against the dismissal of a person on account of his political beliefs or affiliations, imposing as it does an obligation on the employer to demonstrate, inter alia, that there was a substantial reason of a kind such as to justify the dismissal of the employee.

(c) It is also accepted that a fair balance is not upset by the inclusion in the 1996 Act of a one-year qualifying period, the purpose of which is to create greater employment opportunities by encouraging companies to recruit without the risk of being subjected to unwarranted claims by employees for unfair dismissal during the early months of employment. Like the House of Lords in the case of R v. Secretary of State for Employment, ex parte Seymour-Smith and another, we consider that it was and is in principle reasonable and appropriate for the State to lay down a qualifying period and that the period set in the United Kingdom cannot be said to fall outside any acceptable margin of appreciation (see, in the context of a complaint under Article 6 of the Convention, Stedman v. the United Kingdom, application no. 29107/95, decision of 9 April 1997, in which a restriction on access to an industrial tribunal for unfair dismissal to employees of two years' standing was held to pursue a legitimate aim and

not to be arbitrary or to impair the very essence of the right of access to a court). The justification for a qualifying period is not in our view affected by the fact that in an individual case there may be no justifiable grounds for the dismissal or that the dismissal may lead to particular financial or other hardship on the part of the employee concerned. It is the balance struck by the legal system as a whole and not the effect of dismissal in any individual case to which regard must be had.

3. Where we part company with the majority is in the broad assertion in the judgment that, even within the qualifying period, there exists a positive obligation on the authorities under the Convention "to provide protection against dismissal by private employers where the dismissal is motivated solely by the fact that an employer belongs to a particular political party (or at least to provide the means whereby there can be an independent evaluation of the proportionality of such a dismissal in the light of all the circumstances of a given case)" (paragraph 43). In this regard reliance is placed by the majority on the fact that in the United Kingdom the qualifying period is not absolute, certain exceptions having been created in the case, inter alia, of claims by an employee that he has been dismissed on grounds of race, sex or religion but that no exception has been made in the case of a claim of dismissal on grounds of political opinion. It is argued that it is incumbent on the United Kingdom to protect employees, including those with less than one year's service, from dismissal on grounds of political opinion, either through the creation of a further exception to the one-year qualifying period or through the creation of a free-standing claim for unlawful discrimination on grounds of political opinion.

4. We are unable to accept the argument that, having created certain exceptions to the requirement of employment for the qualifying period, the State was obliged to create a further exception in the case of dismissal on grounds of political opinion, still less that the Convention imposes a positive obligation to create a free-standing cause of action, without any temporal limitation. This, in our view, is to press the positive obligation too far. In a complex area of social and economic policy, it is in our view pre-eminently for Parliament to decide what areas require special protection in the field of employment and the consequent scope of any exception created to the general rule. The choice of Parliament of race, sex and religion as grounds requiring special protection can in no sense be seen as random or arbitrary. In this respect we attach importance to the fact that certain grounds of difference of treatment have traditionally been treated by the Court itself as "suspect" and as requiring very weighty reasons by way of justification. These grounds include differences of treatment on grounds of race (D.H. and others v the Czech Republic [GC] no. 57325/10, ECHR 2007), sex (Abdulaziz, Cabales and Balkandali v the United Kingdom, 28 May 1985, Series A No. 94), religion (Hoffmann v Austria, 23 June 1993, Series A no. 94) and nationality and ethnicity

(Timishev v Russia, nos. 55762/00 and 55974/00, ECHR 2005-XII). In addition, the Court has indicated that differences of treatment which are based on immutable characteristics will as a general rule require weightier reasons in justification than differences of treatment based on a characteristic or status which contains an element of choice (Bah v the United Kingdom, no. 56328/07, 27 September 2011).

5. Doubtless the balance could have been struck by the legislator in a different way and further exceptions to the qualifying period might have been created to cover claims for dismissal of other grounds, including that of political opinion or political affiliation. However, this is a different question from the one which the Court is required to determine, namely whether the United Kingdom exceeded its wide margin of appreciation in not extending the list of exceptions or in not creating a free-standing cause of action covering dismissal on grounds of such opinion or affiliation.

6. Since, for the reasons given above, we see a justification for treating differently the comparators relied on by the applicant under Article 14, we have voted in favour of the conclusion in the judgment that it is not necessary to examine separately whether there was also a violation of Article 14 read in conjunction with Article 11.