The Demise of Viking and Laval

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The ECJ sent shockwaves through the trade unions of Europe in December 2007 with its rulings in the cases of *Viking* and *Laval*. In the *Viking* judgement, the ECJ denied that it is “inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms […] will be prejudiced to a certain degree” (paragraph 52). In *Laval* it stated that “the freedom to provide services is one of the fundamental principles of the Community” and that “a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it” (paragraph 101). With these decisions, the ECJ reduced the right of trade unions to take collective action and made it subject to the requirements of the four freedoms, effectively undermining its recognition as a fundamental right according to EU law. In its recent *Holship* ruling, the ECtHR has challenged this.

In *Holship*, the Strasbourg Court explicitly stated that from the perspective of Article 11 of the ECHR, the freedom of establishment is not a counterbalancing fundamental right to the freedom of association but rather one element to be taken into consideration in the assessment of proportionality under Article 11 (2) ECHR. This has potentially wide-reaching implications for the relationship between the human rights recognized in international human rights conventions and EU fundamental freedoms, seen from the perspective of Strasbourg.

Facts of the Case

The background of the case was a conflict over dockworkers` rights to load and unload ships in the port of Drammen in Norway. According to a collective agreement, this work was the prerogative of dockworkers, organized in a local enterprise established by the union and the employer’s association. The Danish Company Holship challenged this right, with the result that the trade union threatened them with a boycott action.

The trade union lost the case in the Norwegian Supreme Court, which found the boycott illegal, as a disproportionate restriction of Holship`s right of establishment under the EEA-agreement. Under the agreement, the EU acquis regarding the four freedoms is part of Norwegian law. The case had been referred to the EFTA Court, which based its opinion on the *Viking*and *Laval* case-law of the ECJ. The EFTA Court, in reference to the ECJ in *Viking*, determined the agreement and the boycott to be a restriction on the right to establishment and set out detailed requirements for the assessment of the proportionality of this restriction. The Supreme Court followed up on this stating:

“The freedom of establishment […] is a fundamental freedom in the EEA, and if the right to boycott is protected under Article 101, first paragraph, of the Constitution, these rights must be weighed against each other as part of a consideration of proportionality. […] [J]ust as rights under the EEA Agreement can justify restriction of constitutional or conventional human rights, so can constitutional or conventional human rights justify restrictions of rights under the EEA Agreement” (paragraph 85).

This clearly puts the rights of the constitution, and thus human rights, on the same footing as the “fundamental freedoms” of the EEA agreement. The Supreme Court, in other words, mirrored the approach of the ECJ to conflicts between the market freedoms of EU law and the human rights recognized as fundamental rights under EU law.

In response, the trade union brought the case to the ECtHR. For matters under EU law and the jurisdiction of the ECJ, reference to the ECtHR is barred by the so-called *Bosphorus* doctrine. According to this doctrine, the ECtHR has declared that it will not hear cases regarding the implementation of EU law, the EU being “an organisation to which a Contracting State has transferred jurisdiction is considered to protect fundamental rights in a manner which can be considered at least “equivalent” to that for which the Convention provides”. It was therefore presumed that the last word had been said about the relationship between fundamental freedoms of the EU and rights of the European convention by the rulings of the ECJ.

Findings

Holship has undone this long-standing assumption. The trade union argued that the *Bosphorus* doctrine could not apply to the EEA, since the EEA lacks supremacy and direct effect, in addition to the absence of the binding legal effect of advisory opinions from the EFTA Court. The protection of individuals under the EEA is therefore not equivalent to the protection under the convention – an argument that the ECtHR accepted. This opened the door for the ECtHR to deal with the substantive issue of the status of rights under the convention when confronting EU fundamental freedoms.

The ECtHR explicitly took issue with the ECJ’s statement in *Viking* that the right to collective action could not be considered inherent to the very exercise of trade unions’ rights (paragraph 52). Contrary to this, and closer to reality, the ECtHR stated in *Holship* “that for a collective action to achieve its aim, it may have to interfere with internal market freedoms such as those at issue in the case before the Supreme Court. […] [C]reating difficulties for the company in respect of loading and unloading, and the possible negative financial consequences flowing therefrom, would have been an important point of the boycott” (paragraph 117). In other words, it is in the nature of a strike or a boycott that it will impede on the exercise of market freedoms. Not to recognize this is to negate the very right itself. This is exactly what the ECJ does, when it says that it is not inherent in trade union rights to prejudice the “fundamental freedoms”.

In consequence, the mere fact that a collective action restricts a market freedom does not mean that this action must justify itself under the proportionality test under EU law. The ECtHR is explicit about this and states that “the degree to which a collective action risks having economic consequences cannot, therefore, in and of itself be a decisive consideration in the analysis of proportionality under Article 11, paragraph 2 of the Convention” (paragraph 117).

Implications

The ECtHR’s findings in *Holship* have implications far beyond trade union rights and Article 11 of the ECHR, and go to the core of the ECJ jurisprudence on the protection of human rights. In dealing with other human rights than the right to collective bargaining, the ECJ has not been as clear in subjecting the human right to a clear proportionality test under the free-movement doctrine of mandatory requirements and overriding reasons of public interest. In *Schmidberger* and *Omega*, the ECJ held that the exercise of the fundamental rights at issue, the freedoms of expression, of assembly and respect for human dignity, did not fall outside the scope of the provisions of the Treaty. But at the same time, it considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

We now know that such a “reconciliation” through a balancing test is not the correct response seen from Strasbourg. Referring to Article 11 of the ECHR, the ECtHR said: “EEA freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality under Article 11, paragraph 2” (paragraph 118). These are clear words. Restrictions of the rights under the convention must be necessary or proportional, whether they are based on national law or EU law. EU “fundamental freedoms” do, from this perspective, not enjoy any privileged position as rights on the same level as the human rights of the convention.

The ECtHR found that there had been no violation of Article 11 ECHR by the decision of the Supreme Court to uphold the ban on the boycott. The reason for this was the large margin of appreciation the ECtHR granted the national authorities in the case, particularly in the light of its specific circumstances. The boycott was directed towards a third party, and it concerned the priority to the work for the dock workers as to the workers employed by Holship. Subsequently, the parties had entered into a new collective agreement.

The result of the ruling, that there had been no violation of the convention by the Norwegian Supreme Court, makes the remarks on the relationship between the Convention and the protection of fundamental rights in the EU, albeit indirectly through dealing with the EEA agreement, even more remarkable. It is difficult to see this from any other perspective than that the unanimous Fifth Section of the ECtHR wanted to send a message to the courts in Luxembourg.

Contrary to the EU, where all “fundamental rights” are on an equal footing (albeit with a preferred position in practice to the market freedoms, at least when confronted with labour rights), the ECtHR maintains a hierarchy of rights, where the rights recognized in the human rights convention are protected by infringements, even by EU fundamental rights.

It will be interesting to see how the other courts will react. The Norwegian Supreme Court must in its practice now subordinate the EEA Agreement to the ECHR. This may put Norway in a position where, to fulfill its obligations under the Convention, it will find itself in breach of the EEA Agreement. Under Norwegian law, however, the case seems clear. Most of the Convention rights are recognized in the constitution, and there is no direct effect and supremacy in the EEA Agreement.

In the EU, things are more complicated. The *Bosphorus* doctrine prevents direct clashes between the ECJ and the ECtHR. The ECJ could take the position that the *Holship* judgement is only relevant to the EEA, and that it has no significance for EU law. Under the spirit of judicial dialogue, however, the ECJ should nevertheless read the *Holship* ruling closely. It may signal a more assertive ECtHR towards the EU. It may also indicate that the ECtHR does not regard the protection of labour rights and other rights protected by the ECHR as at least “equivalent” to those for which the Convention provides, with implications for the application of the *Bosphorus* doctrine.

Thinking ahead, in a setting where climate change is entering the realm of human rights, there is also a potential for stronger conflicts with market freedoms. Strasbourg may not be willing to leave this issue in the hands of Luxembourg. *Holship* must lead to a recalibration of the protection of rights in Europe, where market freedoms must be exercised within the scope allowed by human rights, and not the other way round.
