

# Fundamental Freedoms and Fundamental Rights; Challenges in Deciding the Holship Case on the National Level

EFTA Court Spring Seminar 16 June 2017

**WILHELM MATHESON**

Supreme Court Justice

Norway

# Introduction



# The Basic Facts of the Holship Case











# The Request for an Advisory Opinion



# The Advisory Opinion





(Paragraph 121):

"It is settled case law that restrictions on the freedom of establishment may be justified ... by overriding reasons of general interest..."

(Paragraph 122):

"Collective bargaining and collective action are recognised as fundamental rights. The protection of workers has therefore been recognised as an overriding reason of general interest that may justify restrictions on the freedom of establishment ..."

(Paragraph 123)

"Fundamental rights form part of the unwritten principles of EEA law. The Court has held that the provisions of the ECHR and the judgments of the ECtHR are important sources for determining the scope of these fundamental rights ..."

(Paragraph 123 i.f.):

"It is for the referring court to assess whether certain overriding reasons in the public interest are compatible with fundamental rights in the light of Article 11 ECHR and the case law of the ECtHR ..."

(paragraph 126):

"It appears in the present case that the aggregate effects of the priority clause and the creation of the AO are not limited to the establishment or improvement of working conditions of the workers of the AO and go beyond the core object and elements of collective bargaining and its inherent effects on competition."



(Paragraph 130)

"... for a restriction to be justified it does not simply suffice that it pursues a legitimate aim. A restrictive measure must be such as to guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules ..."

(Paragraph 132):

"It is for the referring court to determine, having regard to all the facts and circumstances before it and the guidance provided by the Court, whether the restrictive measure at issue can be justified."

# Amended Approach Subsequent to the Advisory Opinion



# The Concept of Fundamental Right and its Different Legal Basis



<b>Article</b>	<b>ECHR Fundamental Rights (examples)</b>
<b>6</b>	Right to a fair trial
<b>8</b>	Right to respect for private and family life
<b>10</b>	Freedom of expression
<b>11</b>	Freedom of assembly and association
<b>13</b>	Right to an effective remedy



Article	ECHR	EU Charter	Article
<b>6</b>	Right to a fair trial	Right to an effective remedy and to a fair trial	<b>47</b>
<b>8</b>	Right to respect for private and family life	Respect for private and family life	<b>7</b>
<b>10</b>	Freedom of expression	Freedom of expression and information	<b>11</b>
<b>11</b>	Freedom of assembly and association	Freedom of assembly and association Right of collective bargaining and action	<b>12</b> <b>28</b>
<b>13</b>	Right to an effective remedy	Right to an effective remedy	<b>47</b>

# Fundamental Rights in the Norw Constitution

Chapter E on Human Rights

Article 101:

"Everyone has the right to form, join and leave associations, including trade unions and political parties.

Everyone has the right to meet in peaceful assemblies and demonstrations."

# Article 11 ECHR

## Freedom of Assembly and Association

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."

# EU Charter Article 12

## **Freedom of assembly and of association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union."

# EU Charter Article 28

## **Right of collective bargaining and action**

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."



# EU Charter Article 52

## Scope and interpretation of rights and principles

2. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

# "Balancing Columns"

(Balancing)	ECHR	EU Charter	EEA	Norw Const
Fundamental Rights	<b>Art. 11</b>	<b>Art. 12</b>	<b>Part of unwritten law</b>	<b>Art. 101</b>
	No. 1 Freedom of Association	No. 1 Freedom of Association	Freedom of Association	Freedom of Association
	No. 2 Consideration of Proportionality	<b>Art. 28</b>	Consideration of Proportionality	
		Freedom of Collective Bargaining etc.		
		<b>Art. 52</b>		
	Consideration of Proportionality			
Fundamental Freedoms		<b>Art. 49 TFEU</b>	<b>Art. 31 EEA</b>	<b>Art. 31 EEA</b>
		Freedom of Establishment	Freedom of Establishment	Freedom of Establishment

Prior to Supreme Court's Holship judgment:  
**'Støre assumes that the  
Supreme Court abides by EU  
law in labour law issues'**

Chairman of The Labour Party  
13 December 2016

Foran Holship-dom i Høyesterett:

## Støre forutsetter at Høyesterett følger EU-lovverket i arbeidslivsspørsmål

Ap-leder Jonas Gahr Støre advarer mot oppløsning av normene i norsk arbeidsliv. Han aksepterer at Høyesterett kan overprøves av ESA i Holship-saken og andre dragkamper om disse normene.



Ap-leder Jonas Gahr Støre. Foto: Bert Roldal / NTB scapex



DRAMATISK: Ap-leder Jonas Gahr Støre tror 2017 blir like dramatisk og begivenhetsfullt som 2016.

Av Kjetil Magne Sørenes (tekst) og Christopher Olsson (foto)

Statsministerkandidat Jonas Gahr Støre:

# Beklager dom i Høyesterett

Liker: 1,7 k Del Tweet Skriv ut

## FAKTA

### Jonas Gahr Støre

- 56 år, fra Oslo, gift, tre barn.
- Partileder i Arbeiderpartiet siden 2014.
- Innvalgt på Stortinget fra Oslo siden 2009.
- Var utenriksminister og helse- og omsorgsminister i Stoltenberg II-regjeringen.

**SKJEBNEÅRET:** Får Ap-leder Jonas Gahr Støre makten etter valget neste år, vil han forsøke å hindre at globaliseringen bare tjener de rike. Samtidig beklager han en EØS-dom fra Høyesterett.

## JULEINTERVJU

I dette romjulsintervjuet beklager Jonas Gahr Støre en fersk dom fra Norges Høyesterett. Men først skal 2016s to politiske jordskjelv oppsummeres: brexit og «The Donald».

Han vokter seg for å slå dem i hartkorn. Britenes farvel til EU og

Chairman of The Labour Party  
29 December 2016:

"Regrets the Supreme Court's Judgment"

# The Judgment of the Supreme Court Balancing in Action



# Article 11 ECHR

## Freedom of Assembly and Association

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."

(Paragraph 85):

"The freedom of establishment, as established by Article 31 of the EEA Agreement, 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. This weighing of interests is similar in nature to the one carried out when restrictions are imposed on the freedom of establishment as a result of basic rights forming part of EU and EEA law: just 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."

# "Balancing Columns"

(Balancing)	ECHR	EU Charter	EEA	Norw Const
Fundamental Rights	<b>Art. 11</b>	<b>Art. 12</b>	<b>Part of unwritten law</b>	<b>Art. 101</b>
	No. 1 Freedom of Association	No. 1 Freedom of Association	Freedom of Association	Freedom of Association
	No. 2 Consideration of Proportionality	<b>Art. 28</b>	Consideration of Proportionality	
		Freedom of collective bargaining etc.		
		<b>Art. 52</b>		
		Consideration of Proportionality		
Fundamental Freedoms		<b>Art. 49 TFEU</b>	<b>Art. 31 EEA</b>	<b>Art. 31 EEA</b>
		Freedom of Establishment	Freedom of Establishment	Freedom of Establishment



(Paragraph 86):

"... In any event, if one uses the Constitution as one's starting point, weighing the rights that follow from it against rights under the EEA Agreement, or if one uses the EEA Agreement as one's starting point, weighing rights under it against those that follow from the Constitution, one must try to strike a fair balance between the rights in question. The outcome of weighing the freedom of assembly against the freedom of establishment should not be dependent on the set of rules one uses as one's starting point."

# Adjudication or Interpretation?

(paragraph 126):

"It appears in the present case that the aggregate effects of the priority clause and the creation of the AO are not limited to the establishment or improvement of working conditions of the workers of the AO and go beyond the core object and elements of collective bargaining and its inherent effects on competition."

# Closing Remarks





Professor i jus ved Oslo Universitet, Hans Petter Graver, er med på laget når LO skal ta Holship-saken inn for Den europeiske menneskerettsdomstolen.

Foto: Torgny Hasås

Holship-saken ankes inn for menneskerettsdomstolen

## LO satser tungt i Strasbourg

LO godtar ikke dommen i Høyesterett i Holship-saken. De får med seg en av Norges fremste eksperter på EU-rett når de anker saken inn for Den europeiske menneskerettsdomstolen.

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## LO stakes a lot on Strasbourg

The Holship case will be appealed to the Court of Human Rights

(Press clip 9 June 2017)

Thank you for your attention!

