THE FACTORTAME SAGA: THE FINAL CHAPTER?

R. v. *Secretary of State for Transport, ex parte Factortame and others (Factortame III)* [1993] 3 C.M.L.R. 597; (H.L.) (Lords Slynn, Nicholls, Hoffmann, Hope and Clyde)

INTRODUCTION

The judgment of the House of Lords in *R.* v. *Secretary of State for Transport, ex parte Factortame (Factortame III)* has been greeted primarily with surprise that there could be anything left on which to give judgment in that long-running piece of litigation. In fact a final judgment in Factortame's action against the British Government, in respect of the latter's ill-fated attempt to restrict "quota-hopping" in British waters, remains elusive since issues of causation and quantum have still to be decided. The initial claim, *R.* v. *Secretary of State for Transport, ex parte Factortame*[1] which subsequently became known as *Factortame II,* was the application for judicial review of the validity of the Merchant Shipping Act 1988. This gave rise to an interim application for that Act to be suspended, *R.* v. *Secretary of State for Transport, ex parte Factortame*[2] (known as *Factortame I* since it was the first issue to be decided). Finally, in Joined Cases *Brasserie du Pêcheur* v. *Germany* and *R.* v. *Secretary of State for Transport ex parte Factortame*[3] (*Factortame III*) the applicants claimed damages for losses sustained while the invalid Act had been in force. The ruling of the Court of Justice in *Factortame III* (on the legal principles governing such damages claims) was applied by the Divisional Court in the United Kingdom, which had referred the issue.[4] The judgment of the Divisional Court was subject to appeal in the Court of Appeal and the House of Lords, and the latter's decision has now been given.

THE FACTS AND THE HISTORY OF THE LITIGATION

Briefly, in the 1980s the United Kingdom Government formed the view that Spanish fishing vessels with no genuine connection to the United Kingdom had registered in Britain in order to obtain access to British fishing waters. The Government therefore introduced new licensing conditions pursuant to the Sea Fish (Conservation) Act, 1967 restricting registration by reference to nationality, residence and social security contributions. The majority of these conditions were found by the Court of Justice to be unlawful in *R.* v. *Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd.*[5] and *R.* v. *Ministry of Agriculture, Fisheries and Food, ex parte Jaderow Ltd.*[6] Considering that the situation was worsening, the Government subsequently enacted the Merchant Shipping Act, 1988. This provided that a vessel could only be registered as British if all the legal owners and at least 75 *per cent* of the beneficial owners were "qualified persons or companies"[7] and its charterer, manager or operator was a qualified person. The vessel must also be managed and its operation directed and controlled from within the United Kingdom.

[1] Case C-221/89, [1991] E.C.R. I-3905.

[2] Case C-213/89, [1990] E.C.R. I-2433.

[3] Joined Cases C-46/93 and C-48/93,[1996] 1 C.M.L.R. 889.

[4] Pursuant to article 234 (*ex* 177) EC.

[5] Case C-3/87, [1989] E.C.R. 4459.

[6] Case C-216/87, [1989] E.C.R. 1509.

[7] Qualified persons were defined as British citizens resident and domiciled in the United Kingdom, and qualified companies were defined as those incorporated in the United Kingdom with their principal place of business there.

On 19 June 1990, in *Factortame I*, the Court of Justice ruled that the English rule of law preventing suspension of the Act pending determination of its validity must be disapplied and, on 25 July 1991, in *Factortame II* it held that the requirements of the Merchant Shipping Act as to nationality, residence and domicile for legal and beneficial owners, charterers and managers and operators of fishing vessels were contrary to Community law and in particular to article 43 (*ex* 52) of the EC Treaty on the freedom of establishment. However the requirement that the vessel be managed and its operations directed and controlled from within a Member State was not contrary to Community law.

Meanwhile, the Commission had also brought proceedings against the United Kingdom under article 226 (*ex* 169) EC. On 10 October 1989 the President of the Court of Justice made an order for interim suspension of the Act pending a final ruling and, on 4 October 1991, the Court of Justice ruled the Act invalid in the article 226 EC proceedings. Under article 228 (*ex* 171) EC the United Kingdom was obliged to take measures to comply with this judgment.

In *Factortame III* the Court of Justice repeated its reasoning in *Francovich* v. *Italy*[8] that although the Treaty did not expressly provide for Member State liability in damages for breach of Community law, such liability was vital to ensure the full effectiveness of Community law. The obligation to remedy breaches of Community law was also part of the duty of Member States under article 10 (*ex* 5) EC to fulfill their Treaty obligations. However, where a Member State had a wide discretion over its actions, it could only be liable for a breach of Community law where that breach was sufficiently serious, the rule of law infringed was intended to confer rights on individuals and there was a direct causal link between the breach and the damage sustained by the applicant.[9]

The Court of Justice ruled that the British Government had a wide discretion over the registration of vessels, which was a matter of national competence, and over regulation of fishing, where the common fisheries policy left a margin of discretion to Member States. It confirmed that the first condition was satisfied in *Factortame III* since article 43 (*ex* 52) EC was intended to confer rights on individuals. As to the second condition, the Court of Justice ruled that in assessing whether the breach of Community law committed by the Member State was sufficiently serious, national courts could take into account a number of factors. These factors included the clarity and precision of the rule breached, the measure of discretion left to the national authorities by the rule, whether the infringement and damage were intentional or involuntary, any contribution to the State's act or omission made by the position taken by a Community institution and the adoption or retention of measures or practices contrary to Community law.[10]

When *Factortame III* returned to the Divisional Court[11] in the United Kingdom, that court ruled that, on the facts, the enactment of the Merchant Shipping Act, 1988 constituted a sufficiently serious breach of EC law so as potentially to give rise to liability in damages to the applicants.[12] The court noted a number of relevant factors: the intended effect of the domicile and residence conditions was discrimination on the ground of nationality; the Government was aware that the conditions would cause loss to the applicant; the Commission was hostile; the use of primary legislation meant that

[8] Case C-479/93, [1995] E.C.R. I-3842.

[9] Note 3, *supra*, at 989.

[10] *Ibid*, at 990.

[11] [1998] 1 C.M.L.R 1353.

[12] *I.e.* subject to the latter proving causation and quantum.

under domestic law interim relief was unavailable; the superior rules of law of proportionality and legitimate expectation had been breached; and the Government had failed to comply immediately with the Order of the President of the Court of Justice in proceedings under article 226 (*ex* 169) EC that the Act should be suspended pending determination of its validity.

The Court of Appeal upheld the judgment of the Divisional Court[13] and the Government made a further appeal to the House of Lords. It argued that its breach was excusable, since the law was not clear until the judgment in *Factortame II* and there was substantial objective justification in the form of protection of the national fish quota. In addition, other Member States had adopted the same approach as the United Kingdom, the national courts regarded the issue as complex and the Government had sought and relied on independent legal advice that its action was in accordance with Community law. The United Kingdom was not obliged to follow the advice of the Commission and it had not intended to breach Community law or injure the respondent fishermen. Finally, even if the breach caused by the nationality condition was sufficiently serious, that caused by the residence condition was not.

THE JUDGMENT OF THE HOUSE OF LORDS IN FACTORTAME III

The House of Lords ruled that the conditions as to nationality and domicile constituted a sufficiently serious breach of Community law. First, the relevant rule of Community law was not ambiguous but was clear, and of fundamental importance. The EC Treaty prohibited any discrimination on the ground of nationality and this was underlined in the context of the common agricultural policy in article 34(3) (*ex* 40(3)) EC since any common organisation of the market set up under article 33 (*ex* 39) EC must exclude any discrimination between producers and consumers.

Second, the United Kingdom Government had not acted inadvertently but after consideration, and the inevitable consequence of that action was to prejudice the rights of Spanish fishermen and non-British citizens with financial stakes in British registered fishing vessels.

Third, the nationality condition was obviously discriminatory and contrary to article 43 (*ex* 52 EC). Here, the House of Lords permitted itself to comment obliquely on the fact that the Court of Justice had exceeded its jurisdiction under article 234 (*ex* 177) EC by straying from the interpretation of Community law into its application on the facts. The House of Lords noted that, although the question of whether this was a sufficiently serious breach was a matter for the national courts, the Court of Justice had "stated bluntly that the nationality condition constituted direct discrimination which was manifestly contrary to Community law".

Fourth, the adoption of the nationality condition in the Act was not an unintentional or excusable breach. It was true that legal advice had suggested that a nationality test would be compatible with Community law and that Advocate General Mischo had argued in *Jaderow*[14] that Community law did not restrict the registration of vessels and, in *Agegate*,[15] that certain residence conditions were compatible with Community law. However, that legal advice was qualified and Member State discretion in this area was subject to Community control under the Common Fisheries Policy. The Commission had told the United Kingdom Government that the proposed conditions were

[13] [1998] 3 C.M.L.R. 192.

[14] See n. 6, *supra*.

[15] See n. 5, *supra*.

prima facie contrary to the right of establishment under article 43 (*ex* 52) EC. It had continued to state its opposition and eventually took article 226 (*ex* 169) EC proceedings. Although this advice was not conclusive as to whether there had been a breach of Community law, it was suggestive. In addition, the Divisional Court (and later the House of Lords) suspended all three conditions, and the decisions of the Court of Justice in *Jaderow* and *Agegate* gave the government no encouragement. It was also obvious that the damage suffered by the respondents would be serious and immediate.

In summary, the deliberate adoption of legislation which was clearly discriminatory on the ground of nationality, and which inevitably violated article 43 (*ex* 52) EC, was a manifest breach of the EC Treaty. It was a grave breach, both intrinsically and as regards the consequences it was likely to have on the respondents. The Commission opposed it and, despite the view of Advocate General Mischo, there was no decision of the Court of Justice to support it. The nationality condition therefore constituted a sufficiently serious breach. The retention of this condition after the decisions in the *Agegate* and *Jaderow* and the short transitional period before the coming into force of the 1988 Act constituted a sufficiently serious breach. The domicile condition should be treated in the same way as nationality, and it was therefore also a sufficiently serious breach.

As to the residence condition, a condition applicable to fishermen could be justifiable on the ground of protecting British fishing communities if limited to residence in those communities. However, a condition which covered shareholders and directors of companies owning fishing vessels but allowed fishermen to live anywhere could not be justified. Discrimination on grounds of residence could constitute indirect discrimination on grounds of nationality[16] and in any event it was artificial to separate the conditions. Rather, they should be treated as cumulative. The residence condition therefore constituted a sufficiently serious breach.

COMMENT

There is little of surprise in this judgment in the light of the clear steer given by the Court of Justice in *Factortame III* towards a finding of a sufficiently serious breach, and the judgments of the Divisional Court and the Court of Appeal to that effect. The importance of the judgment really lies in the fact that the highest court in the land has now stated, unequivocally, that the actions of the United Kingdom in respect of quota-hopping constituted a sufficiently serious breach of Community law potentially giving rise to damages. The judgment also gives guidance for future applicants and the government. First, the fact that favourable legal advice is received will not, of itself, render a breach of Community law excusable. Second, any delay in giving effect to a ruling of the Court of Justice is likely to be considered to be a sufficiently serious breach of Community law in itself. Third, where a serious injury to the potential applicant is a foreseeable result of the government's action, this will also give weight to the argument that there has been a sufficiently serious breach.

CONCLUSION

This judgment dealt solely with the issue of whether the breach of Community law committed by the United Kingdom constituted a sufficiently serious breach. The Court

[16] Case 152/73 *Sotgiu* v. *Deutsche Bundespost* [1974] E.C.R. 1530.

of Justice had already ruled that the rule of law breached was for the protection of individuals and the third condition for State liability in damages, the existence of a causal link, was not considered. A further judgment will therefore be required in respect of each applicant in order to determine whether the enactment and retention of the Merchant Shipping Act caused loss to them. Indeed it has been reported that lawyers for many potential applicants among the Spanish fishing community are already working on their compensation claims.[17]

The establishment of a causal link will not necessarily be easy. For example, in *Brasserie du Pêcheur* v. *Germany*[18] the Bundesgerichtshof (the German Federal High Court) ruled that the German Government's prohibition on the import of beer containing additives, although a sufficiently serious breach, had not caused loss to the applicant because no proceedings had been taken against it pursuant to that prohibition.[19]

Similarly, in *R.* v. *Secretary of State for the Home Department ex parte John Gallagher*[20] the Court of Appeal ruled that there was no causal link between the United Kingdom's breach of Community law and the loss suffered by the applicant, Gallagher. The latter had been excluded from the United Kingdom pursuant to procedures laid down by the Prevention of Terrorism (Temporary Provisions) Act 1989 which the Court of Justice subsequently found to be contrary to Directive 64/221 on derogations from the free movement of persons. However, the Court of Appeal held that he could lawfully have been excluded had the procedure laid down in the Directive been properly followed, and indeed would have been so excluded.

Indeed, a failure to prove causation was also fatal ultimately to the claim in *Francovich* v. *Italy (Francovich II)*.[21] Although that case itself involved the non-transposition of a Directive, and therefore the conditions for State liability were slightly different,[22] the applicant failed to prove the causal link between the State's breach and the loss he had suffered. On the facts, the Directive which Italy had failed to transpose into national law would not have given rights to Francovich.

The final hurdle which the *Factortame* applicants face is the award of damages. In the absence of Community legislation governing the award of remedies, national law applies subject to the requirement that reparation must not be impossible or excessively difficult to obtain,[23] and therefore issues such as the mitigation of loss must be addressed. In the interests of justice it is to be hoped that these outstanding issues are resolved more expeditiously than those so far addressed.

ELSPETH DEARDS*

[17] T. Jones, "Law Lords back Spanish claim", *The Times*, October 29 1999.

[18] [1997] 1 C.M.L.R. 971.

[19] Proceedings had been taken against the applicant in respect of another prohibition, that of marketing as "Bier" beer not manufactured in accordance with specific provisions, and therefore a causal link existed between *this* prohibition and the loss to the applicant. However, the German Federal High Court held that the prohibition in question did not constitute a sufficiently serious breach of Community law, and therefore no State liability arose.

[20] [1996] 2 C.M.L.R 951.

[21] *Op. cit.* (The applicant's failure on causation in this case was particularly ironic, given that the principle of Member State liability was first established in the landmark judgment of *Francovich* v. *Italy (Francovich I)* Joined Cases C-6 & C-9/90, [1991] E.C.R. I-5403.

[22] *Ibid.*

[23] See n. 3, *supra*, at 995.

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