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[EUROPEAN COURT OF JUSTICE]

REGINA v. SECRETARY OF STATE FOR TRANSPORT, *Ex parte* FACTORTAME LTD. AND OTHERS (No. 2)

(Case C 213/89)

B

1990 April 5; May 17; June 19

President O. Due
Presidents of Chambers Sir Gordon Slynn, C. N. Kakouris, F. A. Shockweiler and M. Zuleeg
Judges C. F. Mancini, R. Joliet, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, F. Grévisse and M. de Valacso
Advocate General G. Tesauro

C

[HOUSE OF LORDS]

1990 July 2, 3, 4, 5, 9; 25; Oct. 11

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Oliver of Aylmerton, Lord Goff of Chieveley and Lord Jauncey of Tullichettle

D

European Economic Community—Fishing rights—Common fisheries policy—British-registered fishing vessels managed and controlled from Spain—Act and Regulations of 1988 restricting registration as British—Owners' application for judicial review—Contention that Act and Regulations contravening Community law and depriving owners of enforceable Community rights—Interim injunction against Secretary of State restraining enforcement of Act and Regulations—Whether to be granted—European Communities Act 1972 (c. 68), s. 2(1)(4)—Merchant Shipping Act 1988 (c. 12), s. 14—E.E.C. Treaty (Cmnd. 5179-II), arts. 7, 52, 58, 221

E

Judicial Review—Crown—Interim injunctive relief—Application for interim injunction restraining Secretary of State from enforcing provisions of statute and Regulations made thereunder—Applicants' contention that Act and Regulations in conflict with laws of European Community and depriving applicants of enforceable Community rights—Principles on which interlocutory relief to be granted

F

The applicants, companies incorporated under United Kingdom law and their directors and shareholders, most of whom were Spanish nationals, owned between them 95 deep sea fishing vessels registered as British under the Merchant Shipping Act 1894. The statutory régime governing the registration of British fishing vessels was radically altered by Part II of the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988, both of which came into force on 1 December 1988. Vessels previously registered as British under the Act of 1894 required to be re-registered under the Act of 1988, subject to a transitional period permitting their previous registration to continue in force until 31 March 1989. The 95 vessels in question failed to satisfy one or more of the conditions for registration under section 14(1) of the Act of 1988 and thus failed to qualify

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for registration as British fishing vessels by reason of being managed and controlled from Spain or by Spanish nationals or by reason of the proportion of the beneficial ownership of the shares in the applicant companies in Spanish hands. The applicants by application for judicial review sought to challenge the legality of the relevant provisions of the Act and Regulations of 1988 on the ground that they contravened the provisions of the E.E.C. Treaty and other rules of law given effect thereunder by the European Communities Act 1972 by depriving the applicants of enforceable Community rights. The Divisional Court of the Queen's Bench Division decided to request a preliminary ruling from the European Court of Justice in accordance with article 177 of the Treaty on the substantive questions of Community law arising to enable them finally to determine the application. On a motion by the applicants for interim relief, they ordered that, pending final judgment or further order, the operation of Part II of the Act of 1988 and the Regulations of 1988 be disapplied and that the Secretary of State be restrained from enforcing the same in respect of the applicants and their vessels so as to enable the existing registrations of the vessels to continue in being. The Court of Appeal, on appeal by the Secretary of State, set aside the order made by the Divisional Court for interim relief.

On appeal by the applicants, the House of Lords held that, as a matter of English law, the courts had no jurisdiction to grant interim relief in terms that would involve either overturning an English statute in advance of any decision by the European Court of Justice that the statute infringed Community law or granting an injunction against the Crown.

On a reference from the House to the European Court of Justice on the question whether Community law either obliged its national court to grant interim protection of the rights claimed or gave the court power to grant such interim protection:—

Held, that in a case concerning Community law in which an application was made for interim relief, if a national court considered that the only obstacle which precluded it from granting such relief was a rule of national law it had to set that rule aside (post, p. 644G–H).

Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A. (Case 106/77) [1978] E.C.R. 629, E.C.J.; *Amministrazione delle Finanze dello Stato v. Ariete S.p.A.* (Case 811/79) [1980] E.C.R. 2545, E.C.J. and *Amministrazione delle Finanze dello Stato v. MIRECO S.a.S.* (Case 826/79) [1980] E.C.R. 2559, E.C.J. applied.

On the reference back to the House of Lords:—

Held, (1) that in considering whether interim relief should be granted the court had to consider first, the availability to either plaintiff or defendant of an adequate remedy in damages and secondly, if no such adequate remedy existed, the balance of convenience, taking all the circumstances of the case into consideration; that where a public authority seeking to enforce the law was involved, an adequate remedy in damages would not normally be available to either party, and in considering the balance of convenience the court had to take into account the interests of the public in general to whom the authority owed duties; that there was no rule that the party challenging the validity of the law sought to be enforced had to show a strong

prima facie case that it was invalid, and the matter was one for the discretion of the court; but that the court should nevertheless not restrain the public authority from enforcing the law unless it was satisfied that the challenge to its validity was sufficiently firmly based to justify that exceptional course being taken (post, pp. 658E–F, 661C–D, 672A–C, H–673B, 674A–D, 676D, 679A).

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396, H.L.(E.) and *Smith v. Inner London Education Authority* [1978] 1 All E.R. 411, C.A. applied.

F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry [1975] A.C. 295, H.L.(E.) considered.

(2) That the applicants' challenge to the validity of the provisions of section 14 of the Merchant Shipping Act 1988 relating to residence and domicile was, prima facie, a strong one, having regard in particular to existing decisions of the European Court of Justice; that the substantial detriment to the public interest that would have occurred if they eventually failed in their challenge was not sufficient to outweigh the obvious and immediate damage that would continue to be caused to them if interim relief were not granted and they were ultimately successful; and that, accordingly, interim relief should be granted in terms of the order already made (post, pp. 660H–661C, C–D, 674G, 695C–D, 676B–C, 682F–G, 683C–D).

Decision of the Court of Appeal [1989] 2 C.M.L.R. 353 reversed.

The following cases are referred to in their Lordships' opinions:

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.)

Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food [1986] Q.B. 716; [1985] 3 W.L.R. 1027; [1985] 3 All E.R. 585, C.A.

Commission of the European Communities v. United Kingdom (Case 246/89; 246/89 R) [1989] E.C.R. 3125, E.C.J.

Films Rover International Ltd. v. Cannon Film Sales Ltd. [1987] 1 W.L.R. 670; [1986] 3 All E.R. 772

Hoffmann-La Roche (F.) & Co. A.G. v. Secretary of State for Trade and Industry [1975] A.C. 295; [1974] 3 W.L.R. 104; [1974] 2 All E.R. 1128, H.L.(E.)

Reg. v. Ministry of Agriculture, Fisheries and Food, Ex parte Agegate Ltd. (Case C 3/87) [1990] 2 Q.B. 151; [1990] 3 W.L.R. 226, E.C.J.

Reg. v. Ministry of Agriculture, Fisheries and Food, Ex parte Jaderow Ltd. (Case C 216/87) [1990] 2 Q.B. 193; [1990] 3 W.L.R. 265, E.C.J.

Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (Case 221/89) [1989] 2 C.M.L.R. 353, D.C. and C.A.; [1990] 2 A.C. 85; [1989] 2 W.L.R. 997; [1989] 2 All E.R. 692, H.L.(E.)

Sierbien v. Westminster City Council (1987) 86 L.G.R. 431, C.A.

Smith v. Inner London Education Authority [1978] 1 All E.R. 411, C.A.

The following additional cases were cited in argument in the House of Lords:

Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A. (Case 106/77) [1978] E.C.R. 629, E.C.J.

Commission of the European Communities v. Kingdom of Belgium (Case 221/85) [1987] E.C.R. 719, E.C.J.

Commission of the European Communities v. French Republic (Case 167/73) [1974] 1 E.C.R. 359, E.C.J.

Fearon (Robert) & Co. Ltd. v. Irish Land Commission (Case 182/83) [1984] E.C.R. 3677, E.C.J.

Garden Cottage Foods Ltd. v. Milk Marketing Board [1984] A.C. 130; [1983] 3 W.L.R. 143; [1983] 2 All E.R. 770, H.L.(E.)

Locabail International Finance Ltd. v. Agroexport [1986] 1 W.L.R. 657; [1986] 1 All E.R. 901, C.A.

Ordre des Avocats au Barreau de Paris v. Klopp (Case 107/83) [1985] Q.B. 711; [1985] 2 W.L.R. 1058, E.C.J.

Reg. v. Her Majesty's Treasury, Ex parte Daily Mail and General Trust Plc. (Case 81/87) [1989] Q.B. 446; [1989] 2 W.L.R. 908; [1989] 1 All E.R. 328, E.C.J.

Romkes v. Officier van Justitie for the District of Zwolle [1987] E.C.R. 2671, E.C.J.

Smith v. East Elloe Rural District Council [1956] A.C. 736; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855, H.L.(E.)

van Duyn v. Home Office (Case 41/74) [1975] Ch. 358; [1975] 2 W.L.R. 760; [1975] 3 All E.R. 190; [1974] E.C.R. 1337, E.C.J.

The following cases are referred to in the judgment of the European Court of Justice:

Amministrazione delle Finanze dello Stato v. Ariete S.p.A. (Case 811/79) [1980] E.C.R. 2545, E.C.J.

Amministrazione delle Finanze dello Stato v. MIRECO S.a.S. (Case 826/79) [1980] E.C.R. 2559, E.C.J.

Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A. (Case 106/77) [1978] E.C.R. 629, E.C.J.

Commission of the European Communities v. United Kingdom (Case 246/89; 246/89 R) [1989] E.C.R. 3125, E.C.J.

Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (Case 221/89) [1989] 2 C.M.L.R. 353, D.C. and C.A.; [1990] 2 A.C. 85; [1989] 2 W.L.R. 997; [1989] 2 All E.R. 692, H.L.(E.)

The following additional cases were cited in the report of the Judge Rapporteur and the opinion of the Advocate General:

Agricola Commerciale Olio S.r.l. v. Commission of the European Communities (Case 232/81 R) [1981] E.C.R. 2193, E.C.J.

Algemene Transport-en Expeditie Onderneming van Gend en Loos (N.V.) v. Nederlandse Administratie der Belastinger (Case 26/62) [1963] E.C.R. 1, E.C.J.

Alluè v. Università degli Studi di Venezia (Case 33/88), The Times, 16 June 1989, E.C.J.

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.)

Amministrazione delle Finanze dello Stato v. Denkavit Italiana S.r.l. (Case 61/79) [1980] E.C.R. 1205, E.C.J.

Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio (Case 199/82) [1983] E.C.R. 3595, E.C.J.

Association des Centres Distributeurs Édouard Leclerc v. S.à.r.l. "Au blé vert" (Case 229/83) [1985] E.C.R. 1, E.C.J.

Bianco (Les Fils de Jules) S.A. and J. Girard Fils S.A. v. Directeur Général des Douanes et Droits Indirect (Cases 331/85, 376/85, 378/85) [1988] E.C.R. 1099, E.C.J.

A *Bodson v. Pompes Funèbres des Régions Libérées S.A.* (Case 30/87) [1988] E.C.R. 2479, E.C.J.

Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food [1986] Q.B. 716; [1985] 3 W.L.R. 1027; [1985] 3 All E.R. 585, Mann J. and C.A.

Bozzetti v. Invernizzi S.p.A. (Case 179/84) [1985] E.C.R. 2301, E.C.J.

CMC Cooperativa Muratori e Cementisti v. Commission of the European Communities (Case 118/83 R) [1983] E.C.R. 2583, E.C.J.

B *Comet B.V. v. Produktschap voor Siergewassen* (Case 45/76) [1976] E.C.R. 2043, E.C.J.

Commission of the European Communities v. France (Cases 24/80, 97/80 R) [1980] E.C.R. 1319, E.C.J.

Commission of the European Communities v. Hellenic Republic (Case 68/88), The Times, 28 October 1989, E.C.J.

Cullet v. Centre Leclerc Toulouse (Case 231/83) [1985] E.C.R. 305, E.C.J.

C *De Compte v. European Parliament* (Case 44/88 R) [1988] E.C.R. 1669, E.C.J.

De Falco v. Crawley Borough Council [1980] Q.B. 460; [1980] 2 W.L.R. 664; [1980] 1 All E.R. 913, C.A.

Express Dairy Foods Ltd. v. Intervention Board for Agricultural Produce (Case 130/79) [1980] E.C.R. 1887, E.C.J.

Fabbro v. Commission of the European Communities (Case 269/84 R) [1984] E.C.R. 4333, E.C.J.

D *Foto-Frost v. Hauptzollamt Lübeck-Ost* (Case 314/85) [1987] E.C.R. 4199, E.C.J.

Granaria B.V. v. Hoofdproduktschap voor Akkerbouwprodukten (Case 101/78) [1979] E.C.R. 623, E.C.J.

Gutmann v. Commission of the European Atomic Energy Community (Cases 18/65, 35/65) [1966] E.C.R. 103, E.C.J.

E *Johnston v. Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] Q.B. 129; [1986] 3 W.L.R. 1038; [1987] I.C.R. 83; [1986] 3 All E.R. 135, E.C.J.

Just (Hans) I./S. v. Danish Ministry for Fiscal Affairs (Case 68/79) [1980] E.C.R. 501, E.C.J.

Molkerei-Zentrale Westfalen/Lippe G.m.b.H. v. Hauptzollamt Paderborn (Case 28/67) [1969] E.C.R. 143, E.C.J.

F *Nederlandse Sigarenwinkeliers Organisatie v. Commission of the European Communities* (Case 260/82 R) [1982] E.C.R. 4371, E.C.J.

Netherlands v. Reed (Case 59/85) [1986] E.C.R. 1283, E.C.J.

Procureur de la République v. Waterkeyn (Cases 314/81, 315/81, 316/81, 83/82) [1982] E.C.R. 4337, E.C.J.

Reg. v. Kensington and Chelsea Royal London Borough Council, Ex parte Hammel [1989] Q.B. 518; [1989] 2 W.L.R. 90; [1989] 1 All E.R. 1202, C.A.

G *Reg. v. Licensing Authority Established under Medicines Act 1968, Ex parte Smith Kline & French Laboratories Ltd. (No. 2)* [1990] 1 Q.B. 514; [1989] 2 W.L.R. 378; [1989] 2 All E.R. 113, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Herbage [1987] Q.B. 872; [1986] 3 W.L.R. 504; [1986] 3 All E.R. 209

Renckens v. Commission of the European Communities (Case 27/68) [1969] E.C.R. 255, E.C.J.

H *Rewe-Handelsgesellschaft Nord m.b.H. v. Hauptzollamt Kiel* (Case 158/80) [1981] E.C.R. 1805, E.C.J.

Rewe-Zentralfinanz eG v. Landwirtschaftskammer für Saarland (Case 33/76) [1976] E.C.R. 1989, E.C.J.

Salgoil S.p.A. v. Italian Ministry for Foreign Trade (Case 13/68) [1968] E.C.R. 453, E.C.J.

Simmenthal S.p.A. v. Italian Minister for Finance (Case 35/76) [1976] E.C.R. 1871, E.C.J.

Union Nationale des Entraîneurs et Cadres Techniques Professionels du Football v. Heylens (Case 222/86) [1987] E.C.R. 4097, E.C.J.

von Colson and Kamann v. Land Nordrhein-Westfalen (Case 14/83) [1984] E.C.R. 1891, E.C.J.

REFERENCE by the House of Lords under article 177 of the E.E.C. Treaty.

The report for the hearing before the Court of Justice prepared by the Judge Rapporteur, Judge Kakouris, states:

I—BACKGROUND TO THE DISPUTE

1. The applicants in the main proceedings, including Factortame Ltd., were a number of companies incorporated under the laws of the United Kingdom and also the directors and shareholders of those companies, most of whom were Spanish nationals. Those companies between them owned or managed 95 fishing vessels which were until 31 March 1989 registered as British fishing vessels under the Merchant Shipping Act 1894. Of those vessels 53 were originally registered in Spain and flew the Spanish flag. Those 53 vessels were registered under the Act of 1894 at various dates from 1980 onwards. The remaining 42 vessels had always been British. They had been purchased by the appellants at various dates, mainly since 1983.

2. The statutory system governing the registration of British fishing vessels was radically altered by Part II of the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 (S.I. 1988 No. 1926). It was common ground that the United Kingdom amended the previous legislation in order to put a stop to the practice known as "quota hopping" whereby (according to that state) its fishing quotas were "plundered" by fishing vessels flying the British flag but lacking any genuine link with the United Kingdom.

3. The Act of 1988 provided for the establishment of a new register of all British fishing vessels including those registered in the old register maintained under the Act of 1894. However, only fishing vessels fulfilling the conditions laid down in section 14 of the Act of 1988 could be registered in the new register.

4. Briefly, the conditions laid down in section 14 of the new Act, which had to be fulfilled cumulatively, were as follows: (a) Nationality: the legal title to the vessel had to be vested wholly in qualified British citizens or companies; at least 75 per cent. of the beneficial ownership of the vessel must be vested in qualified British citizens or companies; a company was "qualified" if it was incorporated in the United Kingdom and had its principal place of business there, and if at least 75 per cent. of its shares were held by legal owners and beneficial owners who were British citizens; furthermore, at least 75 per cent. of its directors had to be British citizens; the figure of 75 per cent. may be raised provisionally to 100 per cent., pursuant to regulations adopted under the Act of 1988;

A the United Kingdom had not yet availed itself of this possibility; that nationality requirement also applied to a charterer or operator of the vessel, whether he was a natural person or a company. (b) Residence and domicile: this was a further requirement along with nationality. (c) Direction and control: the vessel must be managed, and its operations directed and controlled, from the United Kingdom.

5. The Act of 1988 and the regulations of 1988 came into force on 1 B December 1988. However, under section 13 of the Act of 1988, the validity of registrations made under the previous Act had been extended for a transitional period until 31 March 1989.

6. At the time of the institution of the proceedings in which the appeal arose, the 95 fishing vessels of the applicants failed to satisfy one or more of the conditions for registration under section 14(1) of the Act C of 1988 and thus failed to qualify for registration. Since those vessels could no longer engage in fishing as from 1 April 1989, the companies in question sought by means of an application for judicial review to challenge the compatibility of Part II of the Act of 1988 with Community law.

7. In particular, in their application of 16 December 1988 to the High Court of Justice, Queen's Bench Division, the applicants sought: D (i) a declaration that the provisions of Part II of the Act of 1988 should not apply to them on the grounds that such application would be contrary to Community law, in particular articles 7, 52, 58 and 221 of the E.E.C. Treaty; (ii) an order prohibiting the Secretary of State from treating the existing registration of their vessels (under the Act of 1894) as having ceased from 1 April 1989; (iii) damages; and (iv) interim relief E pending final determination of the issues.

8. The Divisional Court of the Queen's Bench Division (*Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1989] 2 C.M.L.R. 353) gave judgment on 10 March 1989, in which it: (i) decided that it was unable to determine the issues of Community law raised in the proceedings without making a reference under article 177 of the E.E.C. Treaty (now Case 221/89, currently pending before the F Court of Justice); and (ii) ordered that, pending final judgment or further order by the court, the operation of Part II of the Act of 1988 and of the regulations of 1988 be disapplied and the Secretary of State should be restrained from enforcing it in respect of any of the applicants and any vessel owned (in whole or in part), managed, operated or chartered by any of them so as to enable registration of any such vessel G under the Act of 1894 to continue in being.

9. On 13 March 1989 the Secretary of State appealed against the Divisional Court's order for interim relief. By judgment of 22 March 1989 the Court of Appeal [1989] 2 C.M.L.R. 353, held unanimously that under the British constitution the courts had no power to disapply Acts of Parliament on a temporary basis. It therefore set aside the Divisional Court's order and granted leave to appeal to the House of Lords.

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II—The House of Lords' judgment of 18 May 1989

10. In its judgment of 18 May 1989 (*Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85) the House of

Lords found in the first place that the applicants' claims that they would suffer irreparable damage if the interim relief which they sought was not granted and they were successful in the main proceedings were well founded.

11. With regard to the question whether the British courts were empowered to suspend on a temporary basis the operation of an Act and to issue an interim injunction to that effect against the Secretary of State so as to protect the rights claimed by a party under directly enforceable provisions of Community law, the House of Lords found in the first place that, under national law, the British courts had no power to grant interim relief in a case such as the present. The considerations on which that finding of the House of Lords was based might be summarised as follows.

12. In the first place, the presumption that an Act of Parliament was compatible with Community law unless and until declared to be incompatible did not permit the British courts to grant interim relief suspending the operation of the Act in question. In that connection the House of Lords pointed out that an order granting the applicants the interim relief which they sought would only serve their purpose if it declared that which Parliament had enacted to be the law not to be the law until some uncertain future date. Any such order would irreversibly determine in the applicants' favour for a period of some two years rights which were necessarily uncertain until a preliminary ruling had been given by the Court of Justice.

13. Secondly, the old common law rule that a court had no jurisdiction to grant an interlocutory injunction against the Crown, that is to say against the government, also precluded the grant of interim relief in the main proceedings. The House of Lords pointed out in that connection that in *Reg. v. Secretary of State for the Home Department, Ex parte Herbage* [1987] Q.B. 872, the Divisional Court of the Queen's Bench Division took the view that section 31 of the Supreme Court Act 1981 (which provided that the High Court of Justice might grant interim relief, where it would be just and convenient to do so, in all cases in which an application for judicial review had been made) had removed the Crown's immunity from interim relief and that was subsequently affirmed by the Court of Appeal in *Reg. v. Licensing Authority Established under Medicines Act 1968, Ex parte Smith Kline & French Laboratories Ltd. (No. 2)* [1990] 1 Q.B. 574. According to the House of Lords, however, those judgments were based on an erroneous construction of the Supreme Court Act 1981. It therefore overruled them in its judgment in the present case and came to the conclusion that, as a matter of English law, the courts had no jurisdiction to grant interim injunctions against the Crown.

14. Next, the House of Lords turned to the question whether Community law empowered the national courts to grant interim relief of the kind forming the subject matter of the main proceedings, regardless of what was laid down by national law, in order to protect rights which were defensible on serious grounds but whose existence had yet to be established and which were claimed by a party under Community law.

15. After setting out the position of the parties on that point, the House of Lords pointed out in *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85, 151, *per* Lord Bridge of Harwich, that "Community law embodies a principle which appears closely analogous to the principle of English law that delegated legislation must be presumed to be valid unless and until declared invalid" and referred to the Court of Justice's judgment in *Granaria B.V. v. Hoofdproduktschap voor Akkerbouwprodukten* (Case 101/78) [1979] E.C.R 623. Next, it referred to paragraph 19 of the judgment in *Foto-Frost v. Hauptzollamt Lübeck-Ost* (Case 314/85) [1987] E.C.R. 4199, 4232 in which the Court of Justice stated, at paragraph 19, that "the rule that national courts may not themselves declare Community acts invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures; . . ."

16. In those circumstances, the House of Lords considered that the dispute raised an issue concerning the interpretation of Community law and it therefore decided, pursuant to article 177 of the E.E.C. Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

> "1. Where: (i) a party before the national court claims to be entitled to rights under Community law having direct effect in national law ('the rights claimed'), (ii) a national measure in clear terms will, if applied, automatically deprive that party of the rights claimed, (iii) there are serious arguments both for and against the existence of the rights claimed and the national court has sought a preliminary ruling under article 177 as to whether or not the rights claimed exist, (iv) the national law presumes the national measure in question to be compatible with Community law unless and until it is declared incompatible, (v) the national court has no power to give interim protection to the rights claimed by suspending the application of the national measure pending the preliminary ruling, (vi) if the preliminary ruling is in the event in favour of the rights claimed, the party entitled to those rights is likely to have suffered irremediable damage unless given such interim protection, does Community law either (a) oblige the national court to grant such interim protection of the rights claimed; or (b) give the court power to grant such interim protection of the rights claimed? 2. If question 1(a) is answered in the negative and question 1(b) in the affirmative, what are the criteria to be applied in deciding whether or not to grant such interim protection of the rights claimed?"

III—Course of the procedure

17. The judgment of the House of Lords was received at the Court Registry on 10 July 1989.

18. On 4 August 1989, that is to say while the written procedure in the present case was in progress, the Commission of the European Communities brought an action before the Court of Justice under article 169 of the E.E.C. Treaty for a declaration that, by imposing the nationality requirements laid down in section 14 of the Act of 1988, the

United Kingdom had failed to fulfil its obligations under articles 7, 52 and 221 of the E.E.C. Treaty (Case 246/89), now pending. In a separate document, lodged at the Court Registry on the same date, the Commission applied to the Court of Justice for an interim order requiring the United Kingdom to suspend the application of those nationality requirements as regards the nationals of other member states and in respect of fishing vessels which until 31 March 1989 were fishing under the British flag and under a British fishing licence. By order of 10 October 1989 (Case 246/89 R), the President of the Court of Justice granted that application. Pursuant to that order, the United Kingdom made an Order in Council amending section 14 of the Act of 1988 with effect from 2 November 1989.

19. In accordance with article 20 of the Protocol on the Statute of the Court of Justice of the E.E.C., written observations were lodged on 26 October 1989 by the Commission of the European Communities, on 8 November by Ireland, on 9 November by the United Kingdom, and also on 9 November by the applicants in these proceedings.

20. In its order for reference, the House of Lords expressed the wish that the Court of Justice should give priority to the case. The President of the Court of Justice decided, in accordance with the second paragraph of article 55(1) of the Rules of Procedure, that this case should be given priority.

21. On hearing the report of the Judge Rapporteur and the views of the Advocate General, the Court of Justice decided to open the oral procedure without any preparatory inquiry.

IV—Written observations

22. The United Kingdom began by describing the judicial remedies available in the United Kingdom. It pointed out that in proceedings for judicial review, the British courts were empowered to quash the acts of public authorities on grounds including illegality arising from a breach of Community law. The effectiveness of such jurisdiction was enhanced by liberal rules as to locus standi and by the fact that such proceedings could be conducted expeditiously.

23. With regard to legislation, the courts did not have the right, under the British constitution, to nullify an Act of Parliament or to treat it as void or unconstitutional. It was otherwise in the case of legislation which was contrary to Community law since section 2(1) and (4) of the European Communities Act 1972 empowered the courts to uphold the primacy of rights arising from Community law. However, Parliament conferred that power on the courts only at the stage when the matter was finally determined and not for the grant of interim relief.

24. The rules of English law which in the present case precluded the grant of interim relief, namely the presumption that an Act of Parliament was compatible with Community law and the immunity of the Crown from interim relief, were not discriminatory because they did not draw any distinction between rights arising under domestic law and those arising under Community law.

25. With regard to the argument put forward by the applicants in the main proceedings to the effect that, in a criminal prosecution against

A them, those proceedings and consequently the application of the relevant legislation were suspended in the event of a reference being made for a preliminary ruling, the United Kingdom pointed out that in those circumstances it was the proceedings initiated before the national court that were suspended and not the application of the law.

26. The impossibility of securing interim relief of the kind sought in the present case was justified by important considerations of public B policy, such as compliance with the fundamental limits of the judicial function and the need for legal certainty.

27. Furthermore, in terms of Community law, individuals did not normally have locus standi under article 173 of the E.E.C. Treaty to challenge Community legislation. It followed that they could not obtain from the Court of Justice the suspension of Community legislative C measures, however serious the effects of such measures on their business might be. Admittedly, Community legislation could also be challenged in the national courts, but the Court of Justice had held that every regulation which was brought into force in accordance with the E.E.C. Treaty must be presumed to be valid as long as a competent court had not made a finding that it was invalid: see the *Granaria* case [1979] E.C.R. 623. Although the Court of Justice had not ruled out the D possibility that a national court might have jurisdiction temporarily to suspend a provision of Community law (see the *Foto-Frost* case [1987] E.C.R. 4199 and *Zuckerfabrik Süderdithmarshen A.G.* (Case 143/88) now pending before the Court of Justice), the United Kingdom doubted whether it would be consistent with the principle of legal certainty to give the national courts such interim jurisdiction.

E 28. Following a brief survey of the laws of other member states on interim relief, the United Kingdom found that in the majority of those countries it did not seem possible to secure, by means of an application for the grant of interim measures, an order suspending the operation of primary legislation. In the Federal Republic of Germany, the Netherlands and Portugal, where there appeared to be certain wider procedures for challenging legislation and granting interim relief, it was not clear that F the courts had jurisdiction to grant a mandatory order of the kind sought in the main proceedings.

29. Next, the United Kingdom dealt with the Court of Justice's case law on national remedies for the infringement of Community law. It pointed out that, according to the Court of Justices' judgments in *Comet B.V. v. Produktschap voor Siergewassen* (Case 45/76) [1976] E.C.R. G 2043 and in *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für Saarland* (Case 33/76) [1976] E.C.R. 1989, in the absence of Community harmonisation such remedies were a matter for the national legal system, provided that (a) such remedies were no less favourable than those governing domestic disputes of the same type (principle of non-discrimination), and (b) national rules of procedure did not make it impossible in practice to exercise the rights which the national courts H had a duty to protect (principle of effectiveness). Furthermore, it was apparent from paragraph 12 of the judgment in *Express Dairy Foods Ltd. v. Intervention Board for Agricultural Produce* (Case 130/79) [1980] E.C.R. 1887 that it was not for the Court of Justice to lay down general

rules of substance or procedural provisions which only the competent institutions might adopt.

30. According to the United Kingdom, the concept of the direct effect of certain E.E.C. Treaty provisions could not create new remedies in national law. It emphasised that this position was confirmed by the Court of Justice in its judgment in *Rewe-Handelsgesellschaft Nord m.b.H. v. Hauptzollamt Kiel* (Case 158/80) [1981] E.C.R. 1805, 1838, at para. 44, according to which the E.E.C. Treaty "was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law."

31. The Court of Justice therefore acknowledged by implication that the scope of the protection of directly effective rights would vary from one member state to another, pending harmonisation by Community legislation. The only requirement of Community law was that existing remedies should not be emasculated to the point at which there was, in practice, no remedy at all. That was the effect of national legislation, particularly in *Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio* (Case 199/82) [1983] E.C.R. 3595 and in *Les Fils de Jules Bianco S.A. and J. Girard Fils S.A. v. Directeur Général des Douanes et Droits Indirect* (Cases 331, 376 and 378/85) [1988] E.C.R. 1099.

32. Finally, the principle laid down by the Court of Justice in *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case 106/77) [1978] E.C.R. 629, according to which a national court was under a duty to give full effect to provisions of Community law and to protect the rights which those provisions conferred on individuals, if necessary refusing of its own motion to apply any conflicting provision of national legislation, was fully recognised in United Kingdom law. In the *Simmenthal* case the rights in question were not theoretical, because they had been established by the Court of Justice in an earlier judgment (*Simmenthal S.p.A. v. Italian Minister for Finance* (Case 35/76) [1976] E.C.R. 1871); furthermore, the action brought by Simmenthal before an Italian court was a well established remedy in the national legal order. The contrast with the present case was therefore striking.

33. It followed from the foregoing that the United Kingdom's position with regard to remedies was fully in accordance with Community law. None of those remedies had been withheld or fettered in the present case. In an exceptional case such as the present, the protection of individuals might be ensured by the Court of Justice's ability to expedite any reference for a preliminary ruling submitted by a national court (article 55 of the Rules of Procedure) and by the Commission's ability to obtain interim measures under articles 169 and 186 of the E.E.C. Treaty, as in the present case.

34. In conclusion, the United Kingdom submitted that the answer to question 1(b) should be as follows: "Community law does not itself confer on a national court a jurisdiction to grant an interim order to suspend national legislative measures on the basis of claimed or putative rights under Community law having direct effect, if no such remedy exists as a matter of national law."

35. Ireland pointed out, as a preliminary remark, that what was at issue in the present case was not the enforcement of established rights

A enjoyed by the applicants in the main proceedings under provisions of Community law which had direct effect, but whether interim protection might or must be granted before the national court decided whether the applicants enjoyed those rights and, if so, whether such rights had been infringed.

36. Ireland went on to state that the Court of Justice had consistently been reluctant to intervene in the sphere of national remedies for the B enforcement of rights conferred on individuals by Community law, even where such rights (or their infringement) had been established. Ireland referred in that regard to the judgment in the *Rewe-Zentralfinanz* case [1976] E.C.R. 1989 in which the Court of Justice ruled that, in the absence of Community rules on remedies in the national courts, it was for the domestic legal system of each member state to ensure the C protection of the rights arising from the direct effect of Community law.

37. Furthermore, the Court of Justice ruled in the *Rewe-Handelsgesellschaft* case [1981] E.C.R. 1805 that the E.E.C. Treaty was not intended to create new remedies in the national courts to ensure the observance of Community law. The Irish Government emphasised that, if it were otherwise, there would be an unwarranted interference by the Court of Justice in the manner in which national courts applied D Community law according to internal procedures.

38. According to Ireland, it did not follow from the case law of the Court of Justice concerning the principle of effectiveness (the *Comet* case [1976] E.C.R. 2043, and *Amministrazione delle Finanze dello Stato v. MIRECO S.a.S.* (Case 826/79) [1980] E.C.R. 2559) that there was a right to interim protection.

E 39. Finally, Ireland submitted that it would be wholly inappropriate to require the creation of new remedies in national law. Divergences between the national systems as to the right to interim protection could be removed only by legislation on the part of the Council of the European Communities. In the absence of a Community measure of that kind, any problem raised in that regard by national law might be dealt with in the context of a direct action brought by the Commission F against the member state in question.

40. In conclusion, Ireland submitted that the answer to question 1 should be as follows: "(a) Community law does not in the circumstances described in this question oblige the national courts to grant interim protection of the rights claimed where the national court has no obligation or power under national law to grant such protection; G (b) Community law does not in such circumstances give the national court power to grant interim protection of the rights claimed if the national court has no power to grant such interim protection under national law."

41. The applicants pointed out, as a preliminary remark, that they had never suggested that in the ordinary event the grant of interim protection should be mandatory. However, in the light of the specific H circumstances of this case, they contended that the national court was obliged in the present case to make an appropriate protection order.

42. The applicants went on to survey the Court of Justice's case law concerning "directly effective" provisions of Community law and the

rôle of the national courts with regard to the rights conferred on individuals by those provisions.

43. The applicants pointed out that, according to that case law, rules of Community law which were of "direct effect" must be uniformly applied in all the member states from the date of their entry into force and for as long as they continued in force: see *Amministrazione delle Finanze dello Stato v. Ariete S.p.A.* (Case 811/79) [1980] E.C.R. 2545, the *Mireco* case [1980] E.C.R. 2559, and the *Simmenthal* case [1978] E.C.R. 629. Those rules constituted a direct source of rights and duties for all those affected thereby (the *Simmenthal* case) and formed part of the citizens' legal heritage: see *N.V. Algemene Transport-en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62) [1963] E.C.R. 1. The rights arising therefrom for individual citizens were created by the provisions of Community law themselves and not by decisions of the Court of Justice which interpreted those provisions: see *Procureur de la République v. Waterkeyn* (Cases 314/81, 315/81, 316/81, 83/82) [1982] E.C.R. 4337.

44. It was upon the national courts that the obligation of ensuring the legal protection which individuals derived from directly effective provisions of Community law was imposed: see the *Rewe-Zentralfinanz* case [1976] E.C.R. 1989, the *Comet* case [1976] E.C.R. 2043, and *Amministrazione delle Finanze dello Stato v. Denkavit Italiana S.r.l.* (Case 61/79) [1980] E.C.R. 1205. That obligation on the part of the national courts could not be diminished or avoided on the ground that the Commission was empowered to take action against a member state under article 169 of the E.E.C. Treaty or that it might, within the framework of such proceedings, obtain interim measures from the Court of Justice pursuant to article 186 of the E.E.C. Treaty. That followed from the Court of Justice's judgments in the *van Gend en Loos* case and in *Molkerei-Zentrale/Westfalen Lippe G.m.b.H. v. Hauptzollamt Paderborn* (Case 28/67) [1969] E.C.R. 143.

45. The applicants emphasised that the protection afforded to individuals by the national courts must be effective (see *Bozzetti v. Invernizzi S.p.A.* (Case 179/84) [1985] E.C.R. 2301, 2317–2318, para. 17) and not merely symbolic. Such protection also had to be "direct and immediate:" see *Salgoil S.p.A. v. Italian Ministry for Foreign Trade* (Case 13/68) [1968] E.C.R. 453, 462, 463). A temporary impediment to the full effectiveness of Community law was not permitted: see the *Simmenthal* case [1978] E.C.R. 629, 644, para. 23. Consequently, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national courts the power to give appropriate protection was itself incompatible with Community law: see the *Simmenthal* case [1978] E.C.R. 629, *von Colson and Kamann v. Land Nordrhein-Westfalen* (Case 14/83) [1984] E.C.R. 1891, and *Johnston v. Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] Q.B. 129.

46. That was the case with regard to two rules of English law which precluded the grant of the interim relief sought by the applicants.

47. In particular, a reference for a preliminary ruling on the substance of the case was rendered pointless by the presumption of compatibility, because that presumption prevented the national court from safeguarding the position until such time as the Court of Justice gave judgment. Since that presumption restricted the freedom of the national courts to refer to the Court of Justice any question of Community law which needed to be resolved in order to enable it to give judgment, it was incompatible with the principle of "effective protection" and with the second paragraph of article 177 of the E.E.C. Treaty.

48. The paramount importance attributed by Community law to the protection of rights conferred on individuals by its provisions in the period between the submission of a reference for a preliminary ruling and the decision of the Court of Justice was confirmed by the judgment in the *Foto-Frost* case [1987] E.C.R. 4199, 4232, para. 19.

49. With regard to the rule concerning the Crown's immunity from interim relief, the applicants pointed out that that obstacle was artificial because, if they disregarded the Act of 1988 and were prosecuted by the Crown for infringing it, the Crown would be unable to enforce that Act since the national court, by making a reference to the Court of Justice pursuant to article 177 of the E.E.C. Treaty, would suspend the proceedings and protect the rights claimed by the applicants.

50. In any event, the rule concerning the immunity of the Crown constituted an anomaly as regards the exercise of rights arising from provisions of Community law, in that (a) interim relief was available against all other defendants, with the exception of the Crown, although more often than not it was in fact against the authorities of the state, namely the Crown, that rights conferred by Community law had to be enforced, and (b) final relief was available against the Crown.

51. According to the applicants, Community law rendered inapplicable the two rules of English law which removed the possibility of obtaining interim relief of the kind sought in the main proceedings. They emphasised that, if it were otherwise, the United Kingdom would be able flagrantly to disregard Community law in cases such as the present, whilst at the same time taking advantage of the fact that, since a reference was likely to be made to the Court of Justice for a preliminary ruling, holders of rights conferred by Community law would be deprived of the right of exercising them in the interim period. Such deprivation of rights would in practice be permanent in cases where, as in the main proceedings, an action for damages was not available (since, as English law stood at present on the authority of *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716, no action for damages lay against the Crown for infringing an E.E.C. Treaty provision, unless bad faith on the part of the Crown was established) and where the rights of applicants could never be given full retroactive protection in any other way when the final decision actually came to be made. All those considerations revealed the extent of the need, particularly in cases such as the main proceedings, for effective protection to be made available by way of interim relief.

52. Finally, the applicants pointed out that there were a number of reasons why it was entirely misplaced for the United Kingdom to rely on the Court of Justice's judgment in the *Rewe-Handelsgesellschaft* case [1981] E.C.R. 1805 in order to justify the impossibility of obtaining interim relief. In the first place, there was no question of there being any need to create new remedies in the national courts in order to provide appropriate interim relief since the remedies which already existed under English law were perfectly adequate; it was sufficient for the two rules concerning the presumption of compatibility and Crown immunity to be disapplied. Secondly, and in any event, the dicta in that judgment were subject to the proviso, laid down by the Court of Justice in its judgments in the *Comet* case [1976] E.C.R. 2043 and in the *Rewe-Zentralfinanz* case [1976] E.C.R. 1989 and reiterated in its judgment in the *San Giorgio* case [1983] E.C.R. 3595 and elsewhere, that in no circumstances might national measures be such as to render it impossible in practice or excessively difficult for the rights conferred on individuals by Community law to be protected. It was inconceivable that the Court of Justice would apply that proviso to cases of procedural, evidential and limitation rules, but not to a rule of locus standi such as that which was in issue in the *Rewe-Handelsgesellschaft* case [1981] E.C.R. 1805.

53. In conclusion, the applicants submitted that the answer to question 1 should be that, in the circumstances referred to therein, "Community law requires the courts of the member states to have the duty (or at least the power) to grant such interim protection as is appropriate and to disapply to the extent necessary all national legislative measures, rules and judicial practices which constitute obstacles to the grant of effective protection to those such as the applicants in the present case, who rely on directly effective Community law rights."

54. The Commission began with a comparative survey of Community legislation and the national legislation of the member states on interim relief.

55. It pointed out that, in so far as Community law was concerned, article 185 of the E.E.C. Treaty provided, in proceedings for annulment, for the possibility of suspending a Community measure even with respect to primary legislation.

56. On the basis of its survey of national legislation, the Commission came to the conclusion that the laws of all the member states other than Denmark and the United Kingdom empowered the courts to suspend measures which were open to challenge before them. Even in Denmark the courts had jurisdiction to grant such interim relief in certain limited classes of public law proceedings.

57. Next, the Commission referred to the case law of the Court of Justice on protection by the national courts of the rights which Community law conferred on individuals.

58. In the first place, the Court of Justice had emphasised the need for a remedy of a judicial nature against any decision of a national authority refusing to grant an individual the benefit of a right conferred by Community law: see *Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football v. Heylens* (Case 222/86) [1987] E.C.R. 4097, and *Johnston's* case [1987] Q.B. 129.

59. Furthermore, it followed from the case law of the Court of Justice on actions brought by individuals in a national court in order to protect the rights conferred upon them by Community law (see the *Comet* case [1976] E.C.R. 2043 and the *Rewe-Zentralfinanz* case [1976] E.C.R. 1989) that, in the absence of Community rules, the procedures relating to such actions were governed by national law, subject to compliance with the principles of non-discrimination and effectiveness.

60. The principle of non-discrimination was not directly applicable to the present case since the British courts had no jurisdiction to grant interim relief against the Crown, even in cases involving English law alone. In contrast, the principle of effectiveness was directly relevant to the present case. The member states were bound to observe that principle quite independently of the principle of non-discrimination. Accordingly, when a rule contravened the principle of effectiveness, it was no answer to argue that in equivalent cases involving national law alone the rule applied in exactly the same way: see the *San Giorgio* case [1983] E.C.R. 3595.

61. According to the Commission, the most important judgment ever delivered on the scope of the principle of effectiveness was that in the *Simmenthal* case [1978] E.C.R. 629, pp. 643, 644, paras. 15, 16 and 21–23. That ruling made it abundantly clear that the principle of effectiveness was an immediate and inevitable consequence of the concept of direct applicability. It would be nonsense to state that certain provisions of Community law might be relied upon before the national courts if any attempts to rely on them could in fact be thwarted by national rules on remedies or procedure.

62. It followed that the national courts were required to ensure that the parties who relied in proceedings before them on provisions of Community law having direct effect had an effective remedy in national law whereby effect might be given to their rights under those provisions. According to the Commission, the national courts must be empowered to grant interim relief, but without being required to do so in every case in which a plaintiff relied on a directly applicable provision of Community law.

63. The fact that in national law the contested national measure was presumed to be compatible with Community law unless and until it was declared incompatible constituted no logical obstacle to the grant of interim relief suspending its application. The same presumption existed in Community law (see the *Granaria* case [1979] E.C.R. 623) but that did not prevent the Court of Justice from suspending, pursuant to article 185 of the E.E.C. Treaty, the application of Community measures by way of interim relief. In English law also there was a presumption that measures adopted by local authorities were lawful, but that did not prevent the courts from suspending their application by the grant of interim injunctions: see *De Falco v. Crawley Borough Council* [1980] Q.B. 460, and also *Reg. v. Kensington and Chelsea Royal London Borough Council, Ex parte Hammel* [1989] Q.B. 518.

64. The Commission pointed out that, according to the House of Lords, the damage suffered by the applicants was likely to be irremediable unless they were granted the interim protection sought and

they were successful in their main action, since they would probably have no remedy in damages in view of the judgment of the Court of Appeal in the *Bourgoin* case [1986] Q.B. 716.

65. According to the Commission, it could be argued that the likelihood of irremediable damage necessarily implied that the only effective remedy was interim relief. If a party could neither obtain interim relief in order to prevent the damage from occurring nor recover damages ex post facto, the Commission submitted that on any view he was deprived of any effective remedy whereby effect might be given to his rights. That situation could not be justified by the fact that the absence of any remedy was only temporary since, according to paragraph 23 of the judgment in the *Simmenthal* case [1978] E.C.R. 629, even the temporary absence of an effective remedy was contrary to the principle of effectiveness.

66. In conclusion, the Commission submitted that question 1 should be answered as follows: "The obligation on national courts to apply Community law having direct effect and to protect rights which the latter confers on individuals includes the obligation to consider whether interim protection of the rights claimed against the authorities of a member state should be granted in order to avoid irremediable damage and, where appropriate, to grant such interim relief."

Second question

67. The United Kingdom pointed out that in view of the proposed answer to question 1(b) there was no need to answer the other questions submitted by the House of Lords.

68. Ireland submitted that the second question need not be answered in the light of the answer proposed to the first question. However, if the Court of Justice were to give an answer that question, Ireland suggested that it should be as follows: "The conditions for the granting by a national court of such interim relief are a matter solely for national law, subject only to the qualifications that such conditions must not discriminate against Community law by comparison with national law, and must not infringe the prohibition of discrimination on grounds of nationality contained in article 7 of the E.E.C. Treaty."

69. The applicants pointed out that if the Court of Justice's answer to the first question were that the national courts were empowered to grant interim relief, the answer to the second question should be that Community law left the member states free to determine the criteria upon which that power was to be exercised, provided always that the criteria were not defined or applied in any respect (a) less favourably than would be the case if rights under Community law were not involved, or in any event (b) so as to render protection of the rights impossible in practice or excessively difficult to achieve.

70. On that basis the appropriate criteria would be those which the English courts currently applied with regard to interim relief and which involved the court asking itself (a) whether there was a serious issue to be tried, or, in other words, whether the action had a "real prospect of success" (in that regard the applicants referred in particular, to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon*

Ltd. [1975] A.C. 396); (b) if so, whether damages were obtainable and, if they were, whether they constituted an adequate remedy for one side or the other; (c) if not, where the balance of convenience lay as between the parties. In considering the latter question, the court should, in particular, weigh the consequences for the applicant if interim relief were not granted against the consequences for the defendant if interim relief were granted. It could also take into account any other relevant factors such as, for example, the applicant's delay in seeking an interim remedy, or the interaction of private rights with public interests, which was pertinent to this case.

71. Next, the applicants explained in detail the reasons why they satisfied all the aforesaid criteria.

72. The Commission pointed out, as a preliminary remark, that the criteria for the grant of interim relief by the Court of Justice in accordance with article 83(2) of the Rules of Procedure, as interpreted by the Court of Justice, were that the applicant must make out a prima facie case and show the existence of urgency such that interim measures were necessary to avoid serious and irreparable harm. Although article 86(2) of the rules of procedure provided that the Court of Justice might require the applicant to lodge security as a condition for enforcing the order, the Court of Justice rarely imposed such a requirement.

73. Under English law, the criteria to be applied for the grant of interim protection were laid down in (a) the judgments in the *De Falco* case [1980] Q.B. 460 and the *Hammel* case [1989] Q.B. 518 concerning the grant of interim relief against public bodies other than the Crown, such as local authorities, and (b) the judgment of the House of Lords in the *American Cyanamid* case [1975] A.C. 396 concerning the grant of interim relief in proceedings between private individuals. The Commission stated that, according to the latter judgment, the court must first be satisfied that the applicant's claim was neither frivolous nor vexatious. If that condition was fulfilled, the matter was to be determined on a balance of convenience. Finally, if the court decided to grant the interim relief sought, the applicant was required to give a cross-undertaking as to damages.

74. Next, the Commission pointed out that there was nothing to prevent the English courts from applying the criterion already established by their case law for the grant of interim relief against local authorities.

75. In any case, the Commission submitted that, in accordance with general principles, the following matters were to be weighed up by the national courts: (i) the apparent strength of the applicant's case; it was not for Community law to determine whether the applicant must show a serious issue to be tried (see the *American Cyanamid* case) or make out a prima facie case (article 83(2) of the Court of Justice's rules of procedure) or make out a strong prima facie case (the *De Falco* and *Hammel* cases); (ii) the balance of convenience, which included considerations of urgency, the risk of irreparable damage and the public interest. Where, as in this case, the applicant was deprived of his right to carry on his economic activity until the outcome of the main proceedings, great weight must be given to that factor. That was all the more so where, as in this case, he was likely to go bankrupt as a result.

76. According to the Commission, the fact that a cross-undertaking could not be required in a particular case need not constitute an obstacle to the grant of interim relief.

77. Finally, the Commission emphasised that in no case could any of the circumstances which might militate against the grant of interim relief, whether taken alone or with other such circumstances, operate as an absolute bar to such relief, since the person concerned would then be denied an effective remedy. For instance, the fact that the impugned measure constituted the straightforward application of an Act of Parliament could not automatically preclude its suspension.

78. In conclusion, the Commission submitted that question 2 should be answered as follows: "In deciding whether to grant interim relief national courts must weigh up the interests involved in each case, without considering any particular circumstance or set of circumstances as constituting generally an absolute bar to such relief. Moreover, the criteria to be applied by national courts may not be less favourable to the individual than those applying to similar cases relating to national law alone."

Sir Nicholas Lyell Q.C., S.-G., Christopher Bellamy Q.C., Christopher Vajda and T.J.G. Pratt, agent, for the United Kingdom.

James O'Reilly S.C. and Louis J. Dockery, Chief State Solicitor, agent, for the Republic of Ireland.

David Vaughan Q.C., Gerald Barling, David Anderson and Stephen Swabey, solicitor, for the first to ninety-fourth applicants.

Nicholas Forwood Q.C. the ninety-fifth applicant, Rawlings (Trawling) Ltd.

Götz zur Hausen and *Peter Oliver*, agents, for the Commission of the European Communities.

17 May. MR. ADVOCATE GENERAL TESAURO delivered the following opinion.

1. The reply which the Court of Justice is called upon to give to two questions referred to it by the House of Lords for a preliminary ruling in *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85 will rank amongst those which help to define the context of relations between national courts and Community law. And, I would add, on a point of unquestionable importance.

The questions are clear. Pending a ruling by the Court of Justice on the interpretation of provisions of Community law having direct effect, and where United Kingdom law does not permit the national court to suspend, by way of interim relief, the application of the allegedly conflicting national measure and thus, provisionally, to acknowledge an individual's right claimed under Community law but denied by national law: (1) must (or may) the national court grant such relief on the basis of Community law? (2) if so, applying what criteria?

2. The dispute which gave rise to the reference for a preliminary ruling concerns a considerable number of companies operating in the fisheries sector, which are incorporated under the laws of the United Kingdom but represent Spanish interests. These undertakings contest

A the validity under Community law of a United Kingdom statute of 1988 (the Merchant Shipping Act 1988) which altered the requirements for registration in the register of fishing vessels, in particular as regards nationality and residence of the beneficial ownership, deliberately strengthening those requirements in the case of foreign interests (including Community interests). Relying on certain provisions of the E.E.C. Treaty having direct effect, Factortame Ltd. and others instituted B proceedings for judicial review of the Act in question, seeking a declaration that the Act should not apply to them on the ground that such application would be contrary to Community law, an order prohibiting the authorities from treating the registration of the vessels under the old Act (the Merchant Shipping Act 1894) as having ceased, and interim relief pending final judgment.

C 3. At first instance, the Divisional Court of the Queen's Bench Division made a reference to the Court of Justice for a preliminary ruling on the interpretation of the provisions of Community law raised and, as an interim measure, ordered the Secretary of State for Transport not to apply the new Act to the applicants pending final judgment or further order of the court.

4. The Secretary of State for Transport appealed against the order D for interim relief which was set aside by the Court of Appeal on the ground that United Kingdom courts do not have the power to suspend, by way of interim relief, the application of statutes or to grant an injunction against the Crown.

5. The House of Lords, before which the matter was brought, confirmed that as a matter of English law the courts have no power to E suspend the application of an Act of Parliament on the ground of its alleged, but unproved, incompatibility with Community law, and referred to the Court of Justice for a preliminary ruling the questions mentioned above, in order essentially to ascertain whether that which is not permitted by English law is required or permitted by Community law.

6. It should be stated by way of a preliminary observation that the House of Lords acknowledges that it has the power and the duty to give F preference over the conflicting national statute to a provision of the E.E.C. Treaty or a provision of secondary Community law having direct effect in the United Kingdom legal order, and that this is so when the conflict is immediately and readily discernible, either by virtue of an existing interpretation of the Community provision by the Court of Justice or by virtue of the fact that the provision itself is sufficiently G "clear" in its content. The problem arose, however, because there was no certainty as to the interpretation of the Community provisions relevant to the circumstances, but rather there were "serious arguments both for and against the existence of the rights claimed," which prompted the Divisional Court to ask the Court of Justice to give a preliminary ruling on the interpretation of those provisions. The questions raised form the subject matter of different proceedings (Case 221/89) which are H separate from the present proceedings. Moreover, to complete the picture, I would recall that, as regards the alleged incompatibility with Community law of the same United Kingdom statute in point, the Commission of the European Communities brought proceedings under

article 169 of the E.E.C. Treaty against the United Kingdom, but solely on the nationality aspects, likewise seeking, by way of an interim measure, the suspension of application of the Act. The Court of Justice has already made an order granting such a measure in *Commission of the European Communities v. United Kingdom* (Case 246/89 R) [1989] E.C.R. 3125, and the Act has also been amended in that respect.

7. As a further preliminary matter, I think it is appropriate to point out that the problem has arisen in the context of the special proceedings by way of application for judicial review provided for by English law which were brought by the parties concerned even before the new Act on the register of shipping entered into force. On this point both the House of Lords in its order for reference and the United Kingdom in its written observations have stressed that, had the question of a conflict with Community law arisen in the course of criminal or administrative proceedings brought against those same parties for contravention of the Act on the register of shipping, the national court could well have stayed the proceedings (and even any forfeiture proceedings in respect of vessels) pending the outcome of the request for a preliminary ruling by the Court of Justice on the interpretation of the relevant Community provisions. The consequences of the Court of Justice's ruling, whether favourable or unfavourable as regards the claim made by the parties concerned, would then have been applied to them retroactively. The House of Lords infers therefrom that, in such a case, "the prosecution or forefeiture proceedings would not be frustrated but suspended:" see the order for reference.

It is not wholly clear in what perspective attention was drawn to the difference between the situation in this case (proceedings for judicial review) and that which might have arisen in ordinary proceedings of a criminal or other type instituted following the contravention of the Act. What is true, it seems to me, is that, for present purposes, the difference is not of any great importance. The mere stay of proceedings as a result of a reference to the Court of Justice pursuant to article 177 of the E.E.C. Treaty is not an interim measure and does not satisfy any requirements of interim protection of the rights claimed. On the contrary, it unquestionably poses in more acute terms the very problem which necessitates interim protection: whether, if stayed, the proceedings may, precisely, be "frustrated" by the delay in giving final judgment.

Thus the question raised by the House of Lords is of importance in the same way and in the same terms with regard to both the procedural situations indicated to the Court of Justice. It would only be otherwise if, whatever the type of proceedings, the national court were entitled, where proceedings are stayed and a reference is made to the Court of Justice under article 177, also to grant an interim measure of the type requested by the applicants in this case and if, accordingly, it had the power provisionally to allow the ships to be registered on the basis of the old Act pending final judgment; as became clear also at the hearing, this is plainly precluded whether in judicial review proceedings or any other type of proceeding.

8. On the other hand, I attach importance to the fact, stressed by

A the national court, that in a situation such as the one now before the Court of Justice, that is to say in the absence of interim measures, the economic damage suffered by the applicants in the course of the proceedings would remain irreparable, an action for damages being precluded by settled national case law: see the order for reference. It follows that, even were an interpretative ruling to be given by the Court of Justice, upholding the arguments of the applicants, the subsequent B judgment by the national court could not award compensation for the damage suffered and the proceedings might in any event be "frustrated."

That is not to say that compensation for loss suffered is a decisive factor and constitutes a real alternative to interim protection, in view of the fact that, even were it provided for, it would not always and in any event be sufficient in itself to satisfy the requirement of interim C protection, a requirement which arises precisely out of the inadequacy of monetary compensation from the point of view of the "utility" of the future judgment: see, for example, the order of the Court of Justice in *Agricola Commerciale Olio S.r.l. v. Commission of the European Communities* (Case 232/81 R) [1981] E.C.R. 2193, 2200, para. 9. Rather the fact that compensation for damages is precluded makes it by D definition impossible to make good the losses suffered pending judgment in the proceedings.

9. The national court has specifically identified the principles of Community law whose interpretation by way of a preliminary ruling by the Court of Justice would enable it to resolve the problem, in one way or another: the direct effect of the Community provisions relied on, the obligation to provide direct and immediate protection of individual E rights, the practical efficacy of judicial remedies, the obligation to refrain from applying national measures and/or practices which render the exercise of such rights and the protection afforded to them impossible.

Similarly, the formal obstacles to the exercise by the English courts of the power to grant interim protection in proceedings of the type in F question have been made clear: the presumption of validity that attaches to a statute until a final determination is made, a process which may include a ruling by the Court of Justice, and the impossibility of granting an injunction against the Crown, an impossibility which moreover relates not only to interim measures but also to final determinations: see the observations by the United Kingdom.

10. The principles of Community law which the House of Lords has G stated to be relevant and on whose interpretation its decision will depend are fundamental principles enshrined in numerous judgments of the Court of Justice. Those principles are, however, observed (and without difficulty) by the United Kingdom courts, with the sole reservation which constitutes at once the reason for and the subject of these proceedings. Are such principles also to be interpreted as meaning H that the national court must (or may) grant an interim measure requiring the Crown to refrain from applying, during the proceedings on the substance of the case, a "measure" (in this case an Act of Parliament) in respect of which there is no certainty but merely a suspicion, however

serious, that it is incompatible with Community law? In other words, do the obligations which Community law imposes on the national courts concerning the protection of rights conferred directly on individuals also include the requirement to order the suspension, by way of interim protection, of the application of a national law which is alleged to be in conflict with Community law?

11. In addition to a rapid survey of the relevant principles of Community law, which are well known to the national court, the reply to this question calls for an identification of the requirement which is at the origin and is also the raison d'être of interim protection, a concept long established in jurisprudence and in the legal systems of the member states.

12. The starting point for the appraisal of the problem is that, as is accepted in this case, directly effective Community provisions are involved in the now uncontested sense of measures immediately conferring on individuals enforceable legal rights which, as such, may be relied upon before national courts. It is scarcely necessary to emphasise that it is on that assumption that the questions have been referred to the Court of Justice for a preliminary ruling, irrespective of which Community provisions are involved and the correct interpretation thereof. In fact, it is not the interpretation of the individual E.E.C. Treaty provisions relied on by the applicants in the dispute before the national court which is requested in these proceedings (merely for the sake of clarity, I would remind the Court of Justice that articles 7, 52, 58 and 221 of the E.E.C. Treaty are involved), but rather the interpretation of the principles of Community law mentioned above. In other words, the Court of Justice is not requested to embark upon an examination of the substance of the provisions relied on by the applicants, which is the subject of other, and separate, proceedings for a preliminary ruling, which are, I repeat, also pending before the Court of Justice (Case 221/89), but rather to give a general reply with regard to the interim protection of rights claimed by individuals by virtue of directly effective Community provisions.

13. That being so, I would recall that provisions of Community law having direct effect "must be fully and uniformly applied in all the member states from the date of their entry into force and for so long as they continue in force" (among other authorities, see *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case 106/77) [1978] E.C.R. 629, 643, para. 14, and *Amministrazione delle Finanze dello Stato v. Ariete S.p.A.* (Case 811/79) [1980] E.C.R. 2545, 2552–2553, para. 5) and that "this consequence also concerns any national court whose task it is as an organ of a member state to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law:" see the judgment in the *Simmenthal* case, [1978] E.C.R. 629, 643, para. 16. And again in that judgment the Court of Justice affirmed that, in view of the supremacy of Community law, the relevant provisions having direct effect "not only by their entry into force render automatically inapplicable any conflicting provision of current national law," but also "preclude the valid adoption of new national legislative measures to the extent to which they would be

incompatible with Community provisions:" see the judgment in the *Simmenthal* case, at p. 643, para. 17.

It is quite clear, therefore, that a Community provision having immediate effect within the member states confers enforceable legal rights on the individual from its entry into force and for so long as it continues in force, irrespective and even in spite of a prior or subsequent national provisions which might negate those same rights. I do not consider it useful, and even less so in this context, to enter into a sterile dialectical discussion on the theoretical basis of such a firmly established principle. What matters, in so far as is relevant in this case, is that the national court is obliged to afford judicial protection to the rights conferred by a Community provision as from the entry into force of that provision and for so long as it continues in force.

14. Equally beyond dispute, and in harmony with the principle of collaboration enshrined in article 5 of the E.E.C. Treaty, which is the real key to the interpretation of the whole system, is the fact that the methods and the machinery for protecting rights conferred on individuals by provisions of Community law are and remain, in the absence of a harmonised system of procedure, those provided by the domestic legal systems of the member states. That principle, which recurs in the Court of Justice's case law, is nevertheless based on a fundamental precondition, which is also derived from the second paragraph of article 5, namely that the methods and national procedures must be no less favourable than those applying to like remedies for the protection of rights founded on national provisions and must also not be such as to render impossible in practice "the exercise of rights which the national courts are obliged to protect" see *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für Saarland* (Case 33/76) [1976] E.C.R. 1989, 1997, para. 5; *Comet B.V. v. Produktschap voor Siergewassen* (Case 45/76) [1976] E.C.R. 2043, 2053, paras. 15, 16; the *Ariete* case [1980] E.C.R. 2545, 2554, para. 12; *Express Dairy Foods Ltd. v. Intervention Board for Agricultural Produce* (Case 130/79) [1980] E.C.R. 1887, 1900, para. 12; *Amministrazione delle Finanze dello Stato v. Denkavit Italiana S.r.l.* (Case 61/79) [1980] E.C.R. 1205, 1226, para. 25; *Hans Just I./S. v. Danish Ministry for Fiscal Affairs* (Case 68/79) [1980] E.C.R. 501, 522, para. 25; and *Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio* (Case 199/82) [1983] E.C.R. 3595.

Moreover, in its judgment in the *Simmenthal* case [1978] E.C.R. 629, the Court of Justice had affirmed, at p. 644, para. 22:

> "any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law."

(I would also cite *Commission of the European Communities v. Hellenic Republic* (Case 68/88), The Times, 28 October 1990, in which the Court

of Justice re-affirms that "article 5 of the E.E.C. Treaty required member states to take all measures appropriate in order to guarantee the scope and effectiveness of Community law.") In other words, the national court is to apply Community law either through the means provided for under the national legal system or, failing that, "of its own motion:" see the judgment in the *Simmenthal* case, at p. 644, para. 24.

15. It is therefore firmly established, in the light of the Court of Justice's well settled case law, which has moreover been pertinently cited by the House of Lords, that national courts are required to afford complete and effective judicial protection to individuals on whom enforceable rights are conferred under a directly effective Community provision, on condition that the Community provision governs the matter in question from the moment of its entry into force, and that from this it follows that any national provision or practice which precludes those courts from giving "full effect" to the Community provision is incompatible with Community law.

The emphasis of this point should not appear superfluous merely because it recurs in the Courts of Justice's case law, since it is precisely from this observation that I shall derive the reply which I propose that the Court of Justice should give in this case.

16. The problem which the national court has raised is a general one and is not new, even though, although it has been implicitly overcome by other courts (on more than one occasion on which a reference has been made to the Court of Justice in the context of an alleged conflict between a national provision (law or administrative act) and Community law, the national court without hesitation also granted interim measures, which in substance amounted to a provisional suspension of the application of the instrument in question: for example, a stay of execution of an expulsion order from the Netherlands was ordered in *Netherlands v. Reed* (Case 59/85) [1986] E.C.R. 1283; again, an employment relationship with the University of Venice was ordered to be maintained in *Alluè v. Università degli Studi di Venezia* (Case 33/88), The Times, 16 June 1989; and in another case a provisional residence permit was ordered to be issued in Belgium (Case 363/89, pending)), it is submitted for the first time for the judgment of the Court of Justice, perhaps not by chance in the context of the somewhat special situation represented by the procedure for judicial review of laws provided for in the United Kingdom. The question, therefore, does not concern solely the English legal system,[1] nor does it relate solely to the relationship

[1] An analogous problem to the one before the Court of Justice was raised before numerous French courts when a new law on minimum prices for petrol (and also for books) was introduced which was not observed by some distributors who alleged that it was incompatible with Community law. Other traders objected to that attitude and sought interim prohibitory measures on the basis of the new law. Not a few courts granted the orders requested, basing their decision on the presumption of the validity of the law when confronted with a mere suspicion that it was incompatible with the E.E.C. Treaty (for example, judgment of the Tribunal de Grande Instance, Le Mans, 11 July 1983, Gazette du Palais 1984, 1, somm., p. 121); other courts refused to grant the interim measures precisely on the ground that the infringement of the law suspected of being incompatible with Community law was not a "trouble manifestement illicite" (Cour d'Appel, Paris, 4 July 1984, Gazette du Palais 1984, 2, p. 658, note by Fourgoix; Tribunal de Grande Instance, Pontoise, 22 February 1984, Gazette du Palais 1984, p. 296; see Bertin, "Un Trouble Manifestement Illicite: la Lutte contre la Vie Chère," Gazette du Palais 1983, doct., p. 419; also "Le Juge des Référés et le Droit Communautaire, Gazette du Palais, 1984, doct. 48). The French Court of Cassation has given its formal approval to this second approach (Chambre Commerciale, 15 May 1985, Gazette du Palais, 1985, 2, panor., pp. 346 and 347), basing itself, however, on the judgments of the Court of Justice delivered in the meantime to the effect that the contested law was incompatible: see

between a national law and a Community provision, but rather it relates to the requirement for, and the very existence of, the interim protection of a right which is not certain but whose existence is in the course of being determined in a situation where there is a conflict between legal rules of differing rank. This is a conflict which, as regards the relationship between a national provision and a Community provision, quite apart from the theoretical or terminological choices and methods applied in the individual member states, finds effective expression the concept of "primauté," that is to say the "precedence" of the latter provision over the former.

The problem arises from the fact that in a structured and intricate context which a modern system of judicial protection demands there is a lack of contemporaneity between the two points in time which mark the course of the law, namely the point when the right comes into existence and the point (later on) when the existence of the right is (definitively) established.

17. To compensate for the fact that these two points in time do not coincide there is a first and general remedy. It is true that only the definitive establishment of the existence of the right confers on the right fullness and certainty of content in the sense of placing the right itself, and the means whereby it may be exercised, finally beyond dispute (res judicata in the substantive sense); but it is also true that that effect is carried back to the point in time when the right was invoked by initiating the procedure for judicial review. The effect of the establishment of the existence of the right, inappropriately but significantly described as retroactive effect, is merely the consequence of the function of the provision and of its nature and modus operandi which in fact gives rise to an enforceable legal right from the moment when the provision enters into force and for so long as it continues in force. The only possible delay is that which which may occur before the right becomes fully effective and operational in cases where application to a court is needed in order to establish the existence of the right, and in particular in cases of prior review of the validity of the provision which is alleged to be applicable. And it is scarcely necessary to add that the situation would be no different if the question were examined from the opposite point of view and one were to consider the non-existence of the right and the finding to that effect.

What is important to stress is that at the time when an application is made the right already exists (or does not) and the provision which confers that right on (or denies it to) the individual is lawful or unlawful. The procedure for judicial review merely postpones the establishment of the existence of the right, that is to say its full and effective operation, to a later point in time and subject to the "retroactivity" of the effects

Associations des Centres Distributeurs Édouard Leclerc v. S.à.r.l. "Au blé vert" (Case 229/83) [1985] E.C.R. 1 and *Cullet v. Centre Leclerc Toulouse* (Case 231/83) [1985] E.C.R. 305. Subsequently, the Court of Cassation, again as a result of a decision by the Court of Justice (see *Bodson v. Pompes Funèbres des Régions Libérées S.A.* (Case 30/87) [1988] E.C.R. 2479), but in more general terms, affirmed that it was for the judge hearing the application for interim relief to verify "whether the 'trouble' relied on was manifestly unlawful" under the E.E.C. Treaty (Commercial Chamber, 10 July 1989, Dalloz 1989, p. 243). See also Court of Cassation, 22 April 1986, Dalloz 1986, p. 242.

of the actual establishment of the right. That is plainly true both where the establishment of the right entails an appraisal of the link between the factual situation and the provision relied upon and where the national court is called upon to determine the provision applicable from between two or more provisions, which may even be in conflict. In the latter situation, too, where the existence of the right may also be established by means of a review of validity, the provision which will be determined as the one applicable (in place of another declared to be invalid or incompatible) was in reality so applicable at the time when the application was made, inasmuch as at that time what was lacking was only the establishment of the right's existence and not also its actual existence. That has been specifically emphasised also by the Court of Justice in *Amministrazione delle Finanze dello Stato v. MIRECO S.a.S.* (Case 826/79) [1980] E.C.R. 2559, when it held, at p. 2573, para. 7:

> "The interpretation which, in the exercise of the jurisdiction conferred upon it by article 177, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force."

18. The above-mentioned general remedy for the lack of contemporaneity between the establishment of the right's existence and its actual existence does not always succeed in achieving the main objective of judicial protection. Sometimes the right's existence is established too late for the right claimed to be fully and usefully exercised, which is the more likely to be the case the more structured and complex, and the more probably rich in safeguards, is the procedure culminating in the definitive establishment of the right. The result is that in such a case the utility as well as the effectiveness of judicial protection may be lost and there could be a betrayal of the principle, long established in jurisprudence, according to which the need to have recourse to legal proceedings to enforce a right should not occasion damage to the party in the right.

Interim protection has precisely that objective purpose, namely to ensure that the time needed to establish the existence of the right does not in the end have the effect of irremediably depriving the right of substance, by eliminating any possibility of exercising it; in brief, the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection. Interim protection is intended to prevent so far as possible the damage occasioned by the fact that the establishment and the existence of the right are not fully contemporaneous from prejudicing the effectiveness and the very purpose of establishing the right, which was also specifically affirmed by the Court of Justice when it linked interim protection to a requirement that, when delivered, the judgment will be fully effective (see, for example, the order in *Renckens v. Commission of the European Communities* (Case 27/68) [1969] E.C.R. 255, 274; and see also the opinion of Mr. Advocate General Capotorti in *Commission of the European Communities v. France* (Cases 24/80, 97/80 R) [1980] E.C.R. 1319, 1337; further, the orders in *Gutmann v. Commission of the*

European Communities (Cases 18/65, 35/65) [1966] E.C.R. 103, 135, in *Nederlandse Sigarenwinkeliers Organisatie v. Commission of the European Atomic Energy Community* (Case 260/82 R) [1982] E.C.R. 4371, 4377, 4378, in *Fabbro v. Commission of the European Communities* (Case 269/84 R) [1984] E.C.R. 4333, and in *De Compte v. European Parliament* (Case 44/88 R) [1988] E.C.R. 1669, 1670, are in substantially the same terms);[2] or to the need to "preserve the existing position pending a decision on the substance of the case:" *CMC Cooperativa Muratori e Cementisti v. Commission of the European Communities* (Case 118/83 R) [1983] E.C.R. 2583, 2595, para. 37.

19. Now that the function of interim protection has been brought into focus, such protection can be seen to be a fundamental and indispensable instrument of any judicial system, which seeks to achieve, in the particular case and always in an effective manner, the objective of determining the existence of a right and more generally of giving effect to the relevant legal provision, whenever the duration of the proceedings is likely to prejudice the attainment of this objective and therefore to nullify the effectiveness of the judgment.

The requirement for interim protection, moreover, as has already been noted, arises in the same terms, both where the establishment of the right's existence involves the facts and, consequently, the determination of the correct provision to be applied, that is to say where the uncertainty as to the outcome of the application involves (although the expression is not perhaps a happy one) "the facts," and where it is a question of choosing between two or more provisions which may be applicable (for example, a classification problem), irrespective of whether both are presumed to be valid or whether one is presumed to be incompatible with the other, which is of a higher order or in any event has precedence.

In particular, where, as in the case now before the Court of Justice, the determination as to the existence of the right not only involves a

[2] The necessary link between the effectiveness of judicial protection and interim relief was brought into focus, as is known, by Italian (Choivenda, *Istituzioni di Diritto Processuale Civile*, I, Naples, 1933; also *Principi di Diritto Processuale Civile*, Naples, 1906, pp. 137 et seq.; Calamandrei, *Introduzione allo Studio Sistematico dei Provvedimenti Cautelari*, Padua, 1936) and by German academic legal literature (Hellwig, *System des deutschen Zivilprozessrechts*, Leipzig, 1913, II, pp. 22 et seq.). The principle that the duration of the proceedings must not cause damage to the party in the right is to be found in a different formulation in a decision of the German/Polish mixed arbitration tribunal of 29 July 1924: "By means of interim measures the courts seek to make up for the law's delays in such a way that as possible the outcome of the proceedings is the same as if they could have been completed in one day:" Decisions of the Tribunal, V, 455. See also the decision of the Bundesverfassungsgericht (Federal Constitutional Court) of 19 June 1973 commented on in N.J.W. 1973, 34, pp. 1491 et seq. ("The purpose of this special procedure is to secure the effective protection of the court against measures taken by the executive . . . The procedural fundamental right contained in article 19(4)(*bb*) of the Basic Law guarantees not only the formal right and the theoretical possibility of applying to the courts, but also the effectiveness of legal protection. The citizen has a substantive right to judicial review which is in fact effective"). See, finally, Corte Costituzionale No. 190 of 28 June 1985 to the effect that "the principle must be respected whereby the duration of the proceedings should not occasion damage to the party who is right, the validity of which principle has been demonstrated from the beginning of this century not only in Italian academic literature" *Foro Italiano 1985*, I, p. 1881. On the origins and foundations of interim protection in France, see Debbasch, *Procédure Administrative Contentieuse et Procédure Civile*, Paris, 1962, pp. 300 et seq.

choice between two or more provisions which may be applicable but also involves a prior review of the validity or compatibility of one provision vis-à-vis another of a higher order or in any event having precedence, the difference is merely one of appearance, particularly when that review is entrusted to a court on which special jurisdiction has been conferred for the purpose. This situation, too, is fully covered by the typical function of judicial proceedings, which seek to establish the existence of and hence to give effect to the right, so that the requirement that the individual's position be protected on a provisional basis remains the same, inasmuch as it is a question of determining, interpreting and applying to the case in question the relevant (and valid) legal rules.

20. If follows that what is commonly called the presumption of validity, which attaches to laws or administrative acts no less than it does to Community acts, until such time as it is established by judicial determination that the measure in question is incompatible with a rule of law of a higher order or in any event having precedence, to the extent that such a procedure is provided for, does not constitute a formal obstacle to the interim protection of enforceable legal rights. In fact, precisely because what is concerned is a presumption, which as such may be rebutted by the final determination, it remains necessary to provide a remedy to compensate for the fact that the final ruling establishing the existence of the right may come too late and therefore be of no use to the successful party.

In fact, it is certain and undeniable that a provision, whether it is contained in an Act of Parliament or a Community act, or in an administrative act, must be presumed to be valid. But that cannot and must not mean that the courts are precluded from temporarily paralysing its effects with regard to the concrete case before them where, pending a final determination on its validity or compatibility vis-à-vis a provision of a higher order or having precedence, one or other of the legal rights in question is likely to be irremediably impaired and there is a suspicion (the degree of which must be established) that the final determination may entail a finding that the statute or administrative act in question is invalid.

21. In brief, the presumption that a law or an administrative act is valid may not and must not mean that the very possibility of interim protection is precluded where the measure in question may form the subject of a final judicial review of its validity.

Far from running counter to the principle of the validity of laws or administrative acts, which finds expression in a presumption that may always be rebutted by a final determination, interim protection in fact removes the risk that that presumption may lead to the perverse result, certainly not desired by any legal system, negating the function of judicial review and, in particular, of the review of the validity of laws. To take a different view would amount to denying root and branch the possibility of interim protection, not only in relation to laws, but absolutely, given that any act of a public authority, whether it is a rule-making instrument properly so-called or an individual decision, is presumed to be valid until the outcome of the judicial review of its validity.

A 22. In a procedural situation of the type with which we are concerned here, in which one provision is alleged to be incompatible with another of a higher order or having precedence, it is essential, as has already been stressed, to bear in mind the fact that both provisions hypothetically apply to the case in question from the moment when the application is made. That is especially so since the final determination, whose consequences are made to take effect from the time of the application, B creates nothing new as regards the existence (or the non-existence) of the right claimed because the provisions in point are hypothetically valid and operative in the alternative (or invalid and inoperative) and to both is attached what is commonly called a presumption of validity, whilst what is postponed, owing to the time taken by the proceedings, is merely the point in time at which the final determination is made. In the C meantime, a situation prevails which may be defined precisely in terms of "apparent law" and which is the very reason for interim measures, neither of the provisions in point giving rise to rights which are more than putative. It is therefore not a case of there being certainty (with the corresponding presumption of validity) as to one provision and uncertainty as to the other but the putative existence of both provisions. It is for the courts to assess whether the putative nature of the right D claimed is such that interim protection must be granted or refused, on the basis of substantive criteria linked to the greater or lesser extent to which provision at issue appears to be valid (prima facie case, fumus boni juris, however designated) and to the possibility or otherwise that one or other of the interests in question may be prejudiced pending the final outcome of the proceedings.

E 23. The foregoing observations are amply confirmed by the fact that in all the legal systems of the member states (the Danish system constitutes a partial exception), however diverse may be the forms and requirements connected with the duration of the proceedings, there is provision for the interim protection of rights denied under a lower ranking provision but claimed on the basis of a provision of a higher order.

F First of all, it is beyond dispute that the application of an administrative act, which however benefits from a presumption of validity in the same way as a law, so that the bringing of an action does not suspend its operation (except in certain rare cases), may be nevertheless suspended by way of interim relief pending a definitive ruling on validity.

G The provisional disapplication of primary legislation, in legal systems in which judicial review of the validity thereof is provided for, is certainly rarer.

Often the problem of the constitutionality of primary legislation is raised in the context of proceedings brought against an administrative act adopted in pursuance of the legislation in question so that the question of disapplying the legislation as such does not arise: in some H systems this is the only situation possible.

In other countries, on the other hand, and in particular in those where judicial review of the (constitutional) legality of primary legislation is not generally available but is confined to a specific judicial body,

provision is made, or the practice is, for provisional suspension to be ordered. For example, in Germany, the Federal Constitutional Court may provisionally suspend the application of primary legislation in a context (Verfassungsbeschwerden) not dissimilar to that of the English procedure for judicial review (see Bundesverfassungsgericht 16 October 1977, Schleyer, *Foro Italiano 1978*, IV, p. 222; Bundesverfassungsgericht 19 June 1962, BVerfGE, vol. 14, p. 153); so, too, may the ordinary courts, which must then refer the matter to the Constitutional Court: see Bundesverfassungsgericht 5 October 1977, BVerfGE, vol. 46, p. 43.

Of particular relevance, moreover, is the case in Italy, inasmuch as not only do the ordinary courts not have the power to determine the unconstitutionality of laws and must therefore refer the matter to the Constitutional Court, but no power is expressly conferred either on the Constitutional Court or on the ordinary courts (or administrative courts) to grant interim measures (by way of suspension of the application of a law) pending the outcome of review proceedings. Notwithstanding this, many ordinary courts (Pretore, Bari, order of 4 February 1978, *Foro Italiano 1978*, I, p. 1807; Pretore, La Spezia, order of 29 March 1978, *Foro Italiano 1979*, I, p. 285; Pretore, Pisa, order of 30 July 1977, *Foro Italiano 1977*, I, p. 2354; Pretore, Pavia, order of 14 March 1977, Riv. Giur. Lav. 1977, II, p. 640; Pretore, Voltri, order of 1 September 1977, Riv. Giur. Lav. 1977, II, p. 639; Pretore, La Spezia, order of 23 November 1978, *Foro Italiano 1979*, I, p. 1921 et seq.), with the support of the majority view in academic literature (see Verde, "Considerazioni sul Procedimento d'Urgenza," *Studi Andrioli*, Naples 1979, pp. 446 et seq.; *Mortati, Istituzioni di Diritto Pubblico*, 1976, II, p. 1391; Campanile, "Procedimento d'Urgenza e Incidente di Legittimità Costituzionale," Riv. Dir. Proc. 1985, pp. 124 et seq.; Zagrebelsky, "La Tutela d'Urgenza," *le Garanzie Giurisdizionali dei Diritti Fondamentali*, Padua 1988, pp. 27 et seq.; *Sandulli, Manuale di Diritto Amministrativo*, Naples 1984, II, p. 1408), have taken the view that it is possible to issue interim measures suspending the application of primary legislation (obviously with regard only to the parties to the proceedings) pending a ruling by the Constitutional Court. That court, although it has never decided the specific point which is before the Court of Justice (but see, with regard to the permissibility of interim protection pending settlement of jurisdictional questions, Corte Costituzionale No. 73 of 6 June 1973, *Foro Italiano 1973*, I, p. 1657; and see also Corte di Cassazione, Sezioni Unite, 1 December 1978, No. 5678, *Foro Italiano 1978*, I, p. 2704), has not failed to affirm, on the one hand, the essential rôle played by interim relief in ensuring the effectiveness of the system of judicial protection (see Corte Costituzionale 27 December 1974, No. 284, *Foro Italiano 1975*, I, p. 263) and, on the other hand, the existence of a general principle and of a "rule of rationality" underlying the legal system according to which it is for the courts, where the necessary preconditions are fulfilled (i.e. a prima facie case and periculum in mora), to adopt such urgent measures as are appropriate for ensuring, on a provisional basis, the effects of the final decision on the merits: Corte Costituzionale 28 June 1985 No. 190, *Foro Italiano 1985*, I, 1881. See also, for some points of interest, Corte di Cassazione, Sezione Unite

Civili, 1 December 1978, No. 5678, *Foro Italiano 1978*, I, p. 2704; Consiglio di Stato, 14 April 1972, No. 5, *Foro Italiano 1972*, III, p. 105; Consiglio di Stato, 8 October 1982, No. 17, *Foro Italiano 1983*, II, p. 41.

Albeit in a different context, it is also significant that the French Conseil Constitutionnel declared to be unconstitutional a law which did not empower the courts to suspend, by way of interim relief, the application of an administrative decision, and moreover described such suspension as a "garantie essentielle des droits de la défense:" see Decision No. 86–224 DC of 23 January 1987, J.O.R.F. of 25 January 1987, p. 925.

24. If attention is now turned to the relationship between national provisions and Community provisions, there is no doubt that, by means of preliminary rulings given by the Court of Justice and the "direct" competence of national courts, machinery has been introduced which essentially consists of the review of the validity (or of compatibility, if this is preferred) of a national provision in relation to a Community provision, given that the national courts have jurisdiction to rule definitively that the former is incompatible with the latter. And if therefore the national courts may, indeed must, disapply a national law which conflicts with a Community provision having direct effect, once a definitive finding has been made to that effect (or, at any rate, must achieve that substantive result), they must also be able to disapply that law provisionally, provided that the preconditions are satisfied, where the incompatibility is not entirely certain or "established" but may call for a preliminary ruling by the Court of Justice. Otherwise, that judicial protection of the rights conferred on individuals by the Community provision which, as has been affirmed by the Court of Justice on numerous occasions and also specifically pointed out by the House of Lords, is the subject of a precise obligation on the part of the national courts, might be nullified.

25. This brings me back to the concrete case submitted for the consideration of the Court of Justice by way of the questions referred to it by the House of Lords. The right of the applicants in the main proceedings, which is denied by the national statute, is claimed on the basis of certain E.E.C. Treaty provisions having direct effect, that is to say provisions which prevail over domestic law but whose interpretation in the sense contended for is not free from doubt and, consequently, requires a preliminary ruling by the Court of Justice. In the meantime, the national court finds a bar to interim protection of the rights claimed in the presumption of validity which attaches to the statute until a final determination is made.

Inasmuch as the English court, as is undisputed and as it has itself underlined, can and must give precedence, once the final determination is made, by virtue of the review which can be carried out of the compatibility of the English statute with Community law, to the "certain" Community rule having direct effect, it must also be able, where the necessary preconditions are satisfied, to grant interim protection to the rights claimed on the basis of "uncertain" Community rules and denied by the provisions of national law.

The problem is not one of form but of substance. The presumption of validity does not have preclusive effect in view of the fact that it may be rebutted by the final determination, as is the case in the English legal system also by virtue of the European Communities Act 1972, just as the presumption of the validity of any provision subordinate to a provision of a higher order does not preclude interim relief. And it is the national court itself which points this out in the order for reference in relation to the possibility of suspending the application of a subordinate measure which is suspected of being in conflict with a statute.

26. What I mean to say, therefore, is that this assessment must be carried out on the basis of substantive criteria and not, as suggested by the United Kingdom, on the basis of a formal criterion such as the presumption of the validity of statute.

To give priority to the national legislation merely because it has not yet been definitively established as incompatible with Community law (and thus to proceed on the basis merely of a putative compatibility) may amount to depriving the Community rules of the effective judicial protection which is to be afforded to them "from the date of their entry into force and for so long as they continue in force." Paradoxically, the right conferred (putatively) by the provision of Community law would as a general rule receive less, or less effective, protection than rights conferred (also putatively) by the provision of national law. That would be tantamount to saying that the right conferred by ordinary legislation may receive interim protection, whereas protection is denied to the right conferred by the Community, or in any event higher-ranking, provision, on the basis of the presumption of validity in favour of that legislation; as if the same presumption, which after all is nothing other than "putative," did not also avail the provision having precedence.

Let me be quite clear. I do not mean by this that the national court must always and in any event give priority to a right putatively conferred by Community law as opposed to a right putatively conferred by national law, but merely that it must have the power to do so where the factual and legal circumstances so require; in other words it may (and must) not find formal obstacles to any application for interim measures based on directly effective Community provisions.

27. Nor does it avail to put forward as a counter argument the presumption of validity which attaches to Community measures, a presumption stressed many times by the Court of Justice. That is an argument which ends up by demonstrating the contrary. It is scarcely necessary to recall to mind article 185 of the E.E.C. Treaty which expressly provides that the Court of Justice may "if it considers that circumstances so require, order that application of the contested act be suspended."

But that is not all. Even in regard to a system for the review of the validity of Community measures which is rigorously centred on the Court of Justice (also as regards the preliminary rulings procedure under article 177 of the E.E.C. Treaty), the Court of Justice itself has not failed to stress that "the rule that national courts may not themselves declare Community acts invalid may have to be qualified in certain

A circumstances in the case of proceedings relating to an application for interim measures:" see *Foto-Frost v. Hauptzollamt Lübeck-Ost* (Case 314/85) [1987] E.C.R. 4199, 4232, para. 19.

28. Similarly, it is not at the formal but rather on the substantive level that it is necessary to assess the possibility that interim protection may be obtained (also) by way of an injunction against the Crown. By way of example, I would consider it unreasonable to think in terms of B an injunction (to adopt a measure or enact primary legislation) which would amount to an interference with the discretionary powers enjoyed by the Crown or even by Parliament, whilst on the other hand I would regard it as being entirely reasonable and "orthodox" to order concrete non-discretionary action to be taken or, as in this case, the temporary suspension of application of the statute or administrative act, solely with C regard to the parties to the proceedings, until such time as the court is in a position definitively to apply or to disapply one or the other.

29. In conclusion, the reply which I propose should be given by the Court of Justice to the first question put to it by the House of Lords is affirmative in the sense that, under Community law, the national court must be able to afford interim protection, where the pre-conditions are met, to rights claimed by an individual on the basis of provisions of D Community law having direct effect, pending the final outcome of the proceedings, including proceedings on a reference to the Court of Justice for a preliminary ruling. And I also suggest that the Court of Justice should expressly link this power and duty of the national court to the requirement for effective judicial protection which applies in relation to provisions of Community law just as much as it does in relation to E provisions of national law.

30. I need hardly add that such a reply does not amount to imposing remedies or judicial procedures different from those already provided for in the domestic law of the member states but merely implies that such remedies or procedures must be used "for the purpose of ensuring observence of Community provisions having direct effect, on the same conditions concerning admissibility and procedure as would apply were F it a question of ensuring observance of national law:" *Rewe-Handelsgesellschaft Nord m.b.H. v. Hauptzollampt Kiel* (Case 158/80) [1981] E.C.R. 1805, 1838, para. 44. But I would recall once again that the principle in question, according to which the means of affording judicial protection to rights conferred by provisions of Community law remain exclusively those provided for by domestic law, does not apply if G "those rules and time limits made it impossible in practice to exercise rights which the national courts have a duty to protect:" see the *Comet* case [1976] E.C.R. 2043, 2053, para. 16; the *Rewe-Zentralfinanz* case [1976] E.C.R. 1989, 1900, para. 15, the *Express Dairy* case [1980] E.C.R. 1887, 1997–1998, para. 12; the *Denkavit* case [1980] E.C.R. 1205, 1226, para. 25; and the *MIRECO* case [1980] E.C.R. 2559, 2574, para. 13.

H 31. In fact, as is made clear also by the order for reference and the observations of the United Kingdom, provision is made in the United Kingdom procedural system for the interim protection of a right, pending the final determination, whenever a danger would be caused by

delay (periculum in mora) and a prima facie case is made out (the Divisional Court granted the interim relief requested). Consequently, it is not a question here of a procedure which is not provided for by the national legal system, rather it is simply a question of using the existing procedure in order to protect a right claimed on the basis of a provision of Community law having direct effect. The same may be said of the impossibility, to which reference has been made, of obtaining an injunction against the Crown, when in reality it is merely a case or ordering the provisional suspension of the application of a statute to the parties concerned, it being clearly understood that it may be the latter who will bear the risk of a final determination unfavourable to them.

If that were not the case, on the other hand, there would in any event still be a specific obligation, where the appropriate preconditions are satisfied, to afford interim protection, since otherwise we would find ourselves confronted precisely with the situation (I would again mention the *Simmenthal* case [1978] E.C.R. 629) of a procedural system which makes it impossible in practice "to exercise rights which the national courts have a duty to protect." That would be all the more serious if regard were had to the fact, also mentioned in the order for reference, that under the English legal system the definitive establishment of the right claimed never entails the recovery of losses suffered in the course of the proceedings by those claiming the legal right at issue. That is something which, let me be clear, is in itself a matter for concern in the light of the obligation of national courts to give full effect to the provisions of Community law.

32. Nor does there seem to me to be any justified basis for arguing a contrario (as in the observations of Ireland and the United Kingdom) that individuals are afforded sufficient protection by virtue of the right of the Commission, by infringement proceedings brought under article 169 of the E.E.C. Treaty, to apply to the Court of Justice for interim measures, a situation which in fact has occurred in this instance in regard to the nationality requirements of the United Kingdom legislation now before the Court of Justice, as I have already indicated. In this respect may it suffice to recall the judgment in *N.V. Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62) [1963] E.C.R. 1, in which the Court of Justice affirmed that a restriction of the guarantees against an infringement by member states of a Community provision having direct effect to the procedures under articles 169 and 170 "would remove all direct legal protection of the individual rights of their nationals."

33. The reply to the first question raised by the House of Lords, therefore, can only be in the affirmative, in the sense that the national court's duty to afford effective judicial protection to rights conferred on the individual by Community law, where the relevant requirements are satisfied, cannot fail to include the provision of interim protection for the rights claimed, pending a final determination.

Moreover, the first question is whether Community law obliges the national court to grant such interim protection or gives it the power to grant such protection, so that the second question as to the criteria

A which the national court should apply is dependent on a negative reply as to the obligation and an affirmative reply as to the power.

Over and above the literal formulation of the questions and the corresponding replies to be given by the Court of Justice, I consider that it is necessary to be very clear as to the substance. In the first place, it does not seem to me that we are concerned with an alternative, in the proper sense of the term, between an "obligation" and a "power," B regard being had to the fact that what is involved is a judicial activity which the national court is called upon to carry out and which, by its very nature, is an activity involving an assessment of the factual and legal elements presented by the specific case before the national court at any given time. Consequently, it is possible to use the expression "obligation," in accordance with the Court of Justice's case law, in the C sense that the national court performs that obligation by means of an assessment on a case by case basis of the preconditions on which generally the adoption of an interim measure depends.

In this connection, I consider not only that it is for the national court, obviously, to determine whether the preconditions for interim protection are met, but also that, in the absence of Community D harmonisation, those preconditions must be and must remain those provided for by the individual, national legal systems. Further, it does not seem to me that the subject matter allows much room for imagination or offers scope for revolutionary discoveries, since legal theory and positive law, including that of the United Kingdom, have long specified the prima facie case (however designated) and the periculum in mora as the two basic preconditions for interim protection. The accent may be E placed on one or the other according to the legal system in question, or what is a prima facie case may or may not perfectly coincide with the not manifestly ill founded or the prima facie well founded nature of the claim and so on, or it may be that in the assessment of the periculum in mora, apart from the traditional and necessary balancing of the respective interests of the parties (ensuring that the interim measure does not in its F turn cause irreparable damage to the other party), express consideration is also given to the public interest. All that forms part of the prudent appreciation by the national courts which, case by case, will carry out a just appraisal of the appropriateness or necessity of granting or refusing an interim measure for the interim protection of the rights claimed. And there is scarcely any need to point out that in considering whether there is a prima facie case the courts will take account of the possibility that G the national provision may be declared incompatible with Community law.

In the result, as regards the second question in particular, I suggest that the Court of Justice should give a reply which is in conformity with the judgment in the *Comet* case [1976] E.C.R. 2043 in the sense that "the methods and time limits" of the interim protection are and remain, H in the absence of harmonisation, those provided for by the national legal systems, provided that they are not such as to make it impossible in practice "to exercise rights which the national courts have a duty to protect."

Consequently, it is for the national court to draw from the above the necessary inferences as to the determination of the dispute before it on the basis of the factors set out in the statement of the grounds on which the questions are based; the Court of Justice clearly cannot make any assessment of the merits of those factors.

34. On the basis of the foregoing considerations, I therefore propose that the Court of Justice should reply as follows to the questions formulated by the House of Lords: (1) The obligation imposed by Community law on the national court to ensure the effective judicial protection of rights directly conferred on the individual by provisions of Community law includes the obligation, if the need arises and where the factual and legal preconditions are met, to afford interim and urgent protection to rights claimed on the basis of such provisions of Community law, pending a final determination and any interpretation by way of a preliminary ruling given by the Court of Justice. (2) In the absence of Community harmonisation, it is the legal system of each member state which determines the procedural methods and the preconditions for the interim protection of rights vested in individuals by virtue of provisions of Community law having direct effect, on condition that those methods and preconditions do not make it impossible to exercise on an interim basis the rights claimed and are not less favourable than those provided to afford protection to rights founded on national provisions, any provision of national law or any national practice having such an effect being incompatible with Community law.

19 June. The following judgment was delivered in open court in Luxembourg.

1. By a judgment of 18 May 1989 in *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85, which was received at the Court Registry on 10 July 1989, the House of Lords referred to the European Court of Justice for a preliminary ruling under article 177 of the E.E.C. Treaty two questions on the interpretation of Community law. Those questions concern the extent of the power of national courts to grant interim relief where rights claimed under Community law are at issue.

2. The questions were raised in proceedings brought against the Secretary of State for Transport by Factortame Ltd. and other companies incorporated under the laws of the United Kingdom, and also the directors and shareholders of those companies, most of whom are Spanish nationals (hereinafter together referred to as "the applicants").

3. The companies in question are the owners or operators of 95 fishing vessels which were registered in the register of British vessels under the Merchant Shipping Act 1894. Of those vessels, 53 were originally registered in Spain and flew the Spanish flag, but on various dates as from 1980 they were registered in the British register. The remaining 42 vessels have always been registered in the United Kingdom, but were purchased by the companies in question on various dates, mainly since 1983.

4. The statutory system governing the registration of British fishing vessels was radically altered by Part II of the Merchant Shipping Act

A 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 (S.I. 1988 No. 1926). It is common ground that the United Kingdom amended the previous legislation in order to put a stop to the practice known as "quota hopping" whereby, according to the United Kingdom, its fishing quotas were "plundered" by vessels flying the British flag but lacking any genuine link with the United Kingdom.

5. The Act of 1988 provided for the establishment of a new register B in which henceforth all British fishing vessels were to be registered, including those which were already registered in the old general register maintained under the Act of 1894. However, only fishing vessels fulfilling the conditions laid down in section 14 of the Act of 1988 could be registered in the new register.

6. Section 14(1) provides that, subject to dispensations to be C determined by the Secretary of State for Transport, a fishing vessel is eligible to be registered in the new register only if:

> "(*a*) the vessel is British-owned; (*b*) the vessel is managed, and its operations are directed and controlled, from within the United Kingdom and; (*c*) any charterer, manager or operator of the vessel is a qualified person or company."

D According to section 14(2), a fishing vessel is deemed to be British-owned if the legal title to the vessel is vested wholly in one or more qualified persons or companies, and if the vessel is beneficially owned by one or more qualified companies or, as to not less than 75 per cent., by one or more qualified persons. According to section 14(7) "qualified person" means a person who is a British citizen resident and domiciled E in the United Kingdom and "qualified company" means a company incorporated in the United Kingdom and having its principal place of business there, at least 75 per cent. of its shares being owned by one or more qualified persons or companies and at least 75 per cent. of its directors being qualified persons.

7. The Act of 1988 and the Regulations of 1988 entered into force on 1 December 1988. However, under section 13 of the Act of 1988, the F validity of registrations effected under the previous Act was extended for a transitional period until 31 March 1989.

8. On 4 August 1989 the Commission of the European Communities brought an action before the Court of Justice under article 169 of the E.E.C. Treaty for a declaration that, by imposing the nationality requirements laid down in section 14 of the Act of 1988, the United G Kingdom had failed to fulfil its obligations under articles 7, 52 and 221 of the E.E.C. Treaty. That action is the subject of Case 246/89, now pending before the Court of Justice. In a separate document, lodged at the Court Registry on the same date, the Commission applied to the Court of Justice for an interim order requiring the United Kingdom to suspend the application of those nationality requirements as regards the nationals of the other member states and in respect of fishing vessels H which until 31 March 1989 had been carrying on a fishing activity under the British flag and under a British fishing licence. By an order of 10 October 1989 in *Commission of the European Communities v. United Kingdom* (Case 246/89 R) [1989] E.C.R. 3125, the President of the

Court of Justice granted that application. Pursuant to that order, the United Kingdom made an Order in Council amending section 14 of the Act of 1988 with effect from 2 November 1989.

9. At the time of the institution of the proceedings in which the appeal arises, the 95 fishing vessels of the applicants failed to satisfy one or more of the conditions for registration under section 14 of the Act of 1988 and thus could not be registered in the new register.

10. Since those vessels were to be deprived of the right to engage in fishing as from 1 April 1989, the companies in question, by means of an application for judicial review, challenged the compatibility of Part II of the Act of 1988 with Community law. They also applied for the grant of interim relief until such time as final judgment was given on their application for judicial review.

11. In its judgment of 10 March 1989, the Divisional Court of the Queen's Bench Division (i) decided to stay the proceedings and to make a reference under article 177 of the E.E.C. Treaty for a preliminary ruling on the issues of Community law raised in the proceedings; and (ii) ordered that, by way of interim relief, the application of Part II of the Act of 1988 and the Regulations of 1988 should be suspended as regards the applicants.

12. On 13 March 1989, the Secretary of State for Transport appealed against the Divisional Court's order granting interim relief. By judgment of 22 March 1989 the Court of Appeal held that under national law the courts had no power to suspend, by way of interim relief, the application of Acts of Parliament. It therefore set aside the order of the Divisional Court.

13. The House of Lords, before which the matter was brought, delivered its judgment on 18 May 1989. In its judgment it found in the first place that the claims by the applicants that they would suffer irreparable damage if the interim relief which they sought were not granted and they were successful in the main proceedings were well founded. However, it held that, under national law, the English courts had no power to grant interim relief in a case such as the one before it. More specifically, it held that the grant of such relief was precluded by the old common law rule that an interim injunction may not be granted against the Crown, that is to say against the government, in conjunction with the presumption that an Act of Parliament is in conformity with Community law until such time as a decision on its compatibility with that law has been given.

14. The House of Lords then turned to the question whether, notwithstanding that rule of national law, English courts had the power, under Community law, to grant an interim injunction against the Crown.

15. Consequently, taking the view that the dispute raised an issue concerning the interpretation of Community law, the House of Lords decided, pursuant to article 177 of the E.E.C. Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

"1. Where: (i) a party before the national court claims to be entitled to rights under Community law having direct effect in national law ('the rights claimed'), (ii) a national measure in clear

A terms will, if applied, automatically deprive that party of the rights claimed, (iii) there are serious arguments both for and against the existence of the rights claimed and the national court has sought a preliminary ruling under article 177 as to whether or not the rights claimed exist, (iv) the national law presumes the national measure in question to be compatible with Community law unless and until it is declared incompatible, (v) the national court has no power to B give interim protection to the rights claimed by suspending the application of the national measure pending the preliminary ruling, (vi) if the preliminary ruling is in the event in favour of the rights claimed, the party entitled to those rights is likely to have suffered irremediable damage unless given such interim protection, does Community law either (a) oblige the national court to grant such C interim protection of the rights claimed; or (b) give the court power to grant such interim protection of the rights claimed? 2. If question 1(a) is answered in the negative and question 1(b) in the affirmative, what are the criteria to be applied in deciding whether or not to grant such interim protection of the rights claimed?"

16. Reference is made to the report for the hearing for a fuller D account of the facts in the proceedings before the national court, the course of the procedure before and the observations submitted to the Court of Justice, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court of Justice.

17. It is clear from the information before the Court of Justice, and in particular from the judgment making the reference and, as described E above, the course taken by the proceedings in the national courts before which the case came at first and second instance, that the preliminary question raised by the House of Lords seeks essentially to ascertain whether a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must disapply that rule.

18. For the purpose of replying to that question, it is necessary to F point out that in *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case 106/77) [1978] E.C.R. 629 the Court of Justice held, at p. 643, para. 14, that directly applicable rules of Community law "must be fully and uniformly applied in all the member states from the date of their entry into force and for so long as they continue in force" and that, at p. 643, para. 17:

G "in accordance with the principle of the precedence of Community law, the relationship between provisions of the E.E.C. Treaty and directly applicable measures of the institutions on the one hand and the national law of the member-States on the other is such that those provisions and measures . . . by their entry into force render automatically inapplicable any conflicting provision of . . . national law . . ."

H

19. In accordance with the case law of the Court of Justice, it is for the national courts, in application of the principle of co-operation laid down in article 5 of the E.E.C. Treaty, to ensure the legal protection

which persons derive from the direct effect of provisions of Community law: see, most recently, *Amministrazione delle Finanze dello Stato v. Ariete S.p.A.* (Case 811/79) [1980] E.C.R. 2545 and *Amministrazione delle Finanze dello Stato v. MIRECO S.a.S.* (Case 826/79) [1980] E.C.R. 2559.

20. The Court of Justice has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law: see the judgment in the *Simmenthal* case [1978] E.C.R. 629, 644, paras. 22 and 23.

21. It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

22. That interpretation is reinforced by the system established by article 177 of the E.E.C. Treaty whose effectiveness would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice.

23. Consequently, the reply to the question raised should be that Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.

Costs

24. The costs incurred by the United Kingdom, Ireland and the Commission of the European Communities, which have submitted observations to the Court of Justice, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds, the court in reply to the question referred to it for a preliminary ruling by the House of Lords, by judgment of 18 May 1989, hereby rules: Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law,

A considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.

Solicitors: Chief State Solicitor, Republic of Ireland; Treasury Solicitor; Thomas Cooper & Stibbard.

[Reported by PAUL H. NIEKIRK ESQ., Barrister]

B

C After the answers to the questions referred to the European Court of Justice had been received, the matter was reconsidered by the House of Lords.

On 9 July their Lordships made an order for interim relief for reasons to be given later.

The facts are set out in the opinions of Lord Bridge of Harwich and Lord Goff of Chieveley.

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David Vaughan Q.C., Gerald Barling and *David Anderson* for the first to ninety-fourth applicants. There are three main issues in the substantive case (*Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* (Case 221/89)) as referred to the European Court of Justice by the Divisional Court [1989] 2 C.M.L.R. 353: (a) would the E applicants' basic Community law rights (in a field other than fishing) be contravened by nationality, domicile and residence requirements such as those in section 14 of the Merchant Shipping Act 1988? (b) Are these Community law rights removed in the context of registration of vessels by the rule of international law that a state may choose which vessels should fly its flag? (c) Are these Community law rights affected by the existence of the common fisheries policy? Hodgson J. in the Divisional F Court found that the applicants had a "strong prima facie case" on each of the three. Bearing in mind both the factors that were before the Divisional Court and the subsequent legal developments, the applicants' case on the merits is nothing short of overwhelming.

As to (a), the relevant Community law rights are the right of establishment under articles 52 to 58 of the E.E.C. Treaty (Cmnd. G 5179–II) and article 168 of and Annex XII to the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic concerning the adjustments to the Treaties ("Act of Accession") (1985) (Cmnd. 9634); the right to participate in capital (article 221 of the Treaty); the right not to be discriminated against on the grounds of nationality, a general principle that appears, inter alia, from articles 7 and 40(3) of the Treaty (see, e.g., *Commission of the European* H *Communities v. French Republic* (Case 167/73) [1974] 1 E.C.R. 359).

It was conceded by the Secretary of State in the Divisional Court that Community law would prevent the enforcement of United Kingdom nationality, domicile and residence requirements as a condition for the

entry of Community nationals to normal economic activities such as owning a fish and chip shop or operating a fleet of lake pleasure boats. As to the residence requirement, see the judgment of the European Court of 14 December 1989 in *Reg. v. Ministry of Agriculture, Fisheries and Food, Ex parte Agegate Ltd.* (Case C 3/87) [1990] 2 Q.B. 151, which held a crew residence licence condition to be unlawful (paras. 22–26, at pp. 187–188). This must be true a fortiori of an investor/shareholder residence condition for registration. On the place of management and control restriction, the applicants themselves satisfy this restriction and accept that a member state may legitimately impose requirements that are necessary to ensure a "genuine link" between that state and its vessels. Accordingly, the restriction on the place of management and control in section 14 would be incompatible with Community law only to the extent that it was interpreted or applied in such a way as to exclude the possibility that any element of management, direction or control could exist in any other member state.

As to (b), the international law argument (that the requirement imposed by the 1958 Geneva Convention (Cmnd. 584) on the High Seas of a "genuine link" between states and vessels bearing their flag makes it necessary to limit the nationality, domicile and residence of the owners and directors and shareholders in owning companies) is untenable. If it were correct, the United Kingdom would itself have been in breach of the "genuine link" requirements for fishing vessels for the 30 years between the 1958 Convention and the Act of 1988 and would still be in breach of the requirement by not imposing the nationality, residence and domicile conditions on the owners of, and all those financially involved with, vessels other than fishing vessels. The point of the "genuine link" requirement is to ensure that a state has sufficient control over a vessel, principally for the purpose of ensuring safety with regard to such matters as signals, communications and the prevention of collisions, the manning and labour conditions of the crew and the construction, equipment and seaworthiness of the ships. The requisite jurisdiction and control would not be significantly assisted by the restrictions placed by the Act of 1988 on investors and company directors, many of whom will never have seen the vessel in question. Even if the restrictions could assist, it is not seriously arguable that they are necessary in order to avoid the British flag becoming a flag of convenience. The requirement of a genuine link could be much more easily ensured by restrictions relating to the vessel itself: the requirement of onshore representation in the flag state, for example, which forms part of the Commission's recommendation of 19 July 1989. The existence of less onerous methods of ensuring a genuine link renders the Act of 1988 restrictions disproportionate.

In any event, the 1958 Convention expressly provides, by article 30, that it is to be read subject to the provisions of international agreements already in force, which include the E.E.C. Treaty; the provision applies to the United Kingdom just as it does to other member states; and, as regards the obligations of member states inter se, Community law must, if necessary, be taken to prevail over conflicting provisions of public international law.

The international law argument was rejected on a prima facie basis by the European Court in *Commission of the European Communities v. United Kingdom* (Case 246/89 R) [1989] E.C.R. 3125, (impliedly overruling, to the extent to which it was necessary to do so, the remark of Advocate-General Mischo in *Reg. v. Ministry of Agriculture, Fisheries and Food, Ex parte Jaderow Ltd.* (Case C 216/87) [1990] 2 Q.B. 193, 208 at paragraph 7 of his opinion).

As to (c), basic treaty principles prevail over the specific rules of the common agricultural policy (including the common fisheries policy unless articles 39 to 46 of the Treaty call for derogations either expressly or by necessary implication: article 38(2) of the Treaty. Articles 39 to 46 make no such express or implied call for derogations; indeed, article 40(3) reaffirms the general principle of non-discrimination in the specific context of the common agricultural policy. Secondary Community legislation cannot authorise derogations from the Treaty, but the secondary legislation in any case affords the Secretary of State no support. On the contrary, the secondary legislation confirms the applicants' contention that the common fisheries policy, far from being exempt from the basic principles of Community law such as the right of establishment, the prohibition of discrimination and the right to free movement of goods, is expressly subjected to each of them. Nor is it the case that the very existence of national quotas justifies discrimination on grounds of nationality, domicile and residence "by necessary implication" or otherwise. National quotas, even if established in part for the benefit of the fishermen of each member state, cannot justify discrimination in favour of company directors and investors, as provided for by the Act of 1988. And if the national quotas were established in part for the benefit of the traditional fishing communities of each member state, again the quotas cannot justify as "necessary" the discrimination contained in the Act of 1988. The Act has no regard to whether or not a person is involved in the indigenous fishing industry. There is no correspondence in practice or in theory between financial involvement in the applicants' vessels (which cost about £1m. to build) and membership of a traditional fishing community. (c) The Act does nothing to help British fishermen or traditional fishing communities. Indeed, it has disadvantaged many of them by forcing the laying-up of boats that had been involved in the British fishing industry for years, with consequent unemployment and hardship of United Kingdom residents (including Britons) referred to in the affidavit evidence and accepted by all courts; and by restricting the access of the British fishing industry to foreign capital.

In any event, the common fisheries policy is concerned solely with the management of quota stocks in Community waters. It could not justify a measure that, by placing restrictions on the registration of a boat rather than on the grant of quota stock licences, extends to all fishing vessels, including those which fish for non-quota stocks and those which fish outside the Community 200-mile limit.

The following relevant legal developments since the judgment of the Divisional Court further strengthen the applicants' case.

(a) It has always been known that 42 of the applicants' vessels have always been British flag vessels and that 36 of them were part of the

United Kingdom fleet during the period 1973–78, the reference period for the allocation of national quotas introduced in 1983. It came to the notice of the applicants' solicitors only in April 1989 (after the hearings in the Divisional Court and the Court of Appeal) that a further 43 of the applicants' vessels were explicitly accorded rights as "joint venture vessels" by virtue of article 168.4 of, and Annex XII to, the Act of Accession (1985) (Cmnd. 9634). On 12 June 1985, the date of signature of that Act, all those 43 vessels (ex-Spanish-flag boats that had transferred to the British flag before 1983) were registered as British fishing vessels fishing against United Kingdom quotas. The Act of Accession thus gave the applicants additional and specific Community rights with Treaty status. The allegation of "quota-hopping" is also seen as particularly unjust when 42 of the 95 vessels have never been anything other than British, and when a further 43 transferred to the British flag before quotas were introduced in 1983. It should also be remarked that the European Court decided to give interim relief in *Commission of the European Communities v. United Kingdom* (Case 246/89 R) without the Commission being aware of or having relied on the presence of the 43 vessels in Annex XII to the Act of Accession.

(b) By interim order in *Commission of the European Communities v. United Kingdom* the President of the European Court, having seen and heard written and oral argument by the Solicitor-General on behalf of the United Kingdom, acceded to the Commission's application for suspension of the nationality requirement in section 14 of the Act of 1988 pending judgment in the main proceedings (Case 246/89). In opposition to the Commission's application, the United Kingdom raised both the international law defence (remarking that the conditions corresponded to those imposed by other member-states) and the common fisheries policy defence. The President considered that the requirement of a prima facie case had been satisfied to the standard required for the grant of interim relief in the European Court. His order, however, has even greater significance in that (i) he applied the usual prima facie case/balance of interests test of the European Court, very similar to that in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, without modifying it because he was dealing with the primary legislation of a member state (see, also, the indication by Mr. Advocate General Tesauro in paragraphs 30–34 of his opinion (ante, pp. 637–640) that a prima facie test was appropriate in the national court); and (ii) the President did not confine himself (as would have been sufficient under the case law of the court) to the question whether the Commission had a prima facie case. He expressed the provisional view that the Commission had much the stronger case by referring to there being no basis on which he thought that the United Kingdom's argument might be upheld and saying separately with regard to each defence that there was "nothing" before him to suggest that the United Kingdom had a prima facie case. His order accordingly provides the best guide that is ever likely to be available on an interim basis to the probability of success of a substantive action that has been referred by a United Kingdom court to the European Court.

(c) The *Agegate* case (Case C 3/87) [1990] 2 Q.B. 151 and the *Jaderow* case (Case C 216/87) [1990] 2 Q.B. 193 are not directly in point since they concern the validity of licence conditions rather than the validity of conditions for the registration of vessels. Nonetheless, the judgments are relevant in the following respects. First, the court in *Agegate* struck down the United Kingdom licence condition that 75 per cent. of the crew must be ordinarily resident in the United Kingdom: [1990] 2 Q.B. 151, 187–188, paras. 22–26. The court started from the presumption that the residence requirement was discriminatory and held that it could not be justified by the aim of the quota system. If residence requirements cannot be justified for fishermen, the same must be true a fortiori of residence and domicile requirements imposed on owners, shareholders, directors and financial backers, who are at least one remove from the fishermen themselves: see *Commission of the European Communities v. Kingdom of Belgium* (Case 221/85) [1987] E.C.R. 719. *per* Mr. Advocate General Lenz, point 35, p. 733. Secondly, the court in *Jaderow* held that member states were justified in taking certain types of measure to ensure that a vessel had a "real economic link" with a member state: [1990] 2 Q.B. 193, 221–222, paras. 21–27. The "economic" link has a different purpose in the context of licence conditions from its purpose in the context of registration. The European Court took a very narrow view of the permissible "economic links" that could be imposed as licence conditions, insisting that they concerned only the relations between a vessel's fishing operations and the populations dependent on fisheries and related industries: [1990] 2 Q.B. 193, 224–225, paras. 42–44. This points to a similarly narrow view of the extent to which an economic link may be imposed as a condition of registration.

Although the Divisional Court [1989] 2 C.M.L.R. 353 found it necessary to refer the substantive issues to Luxembourg (Case 221/89), it is possible to say with a high degree of certainty (should this be necessary at the interim stage) that the applicants are the probable winners. Particularly helpful in this respect are the matters before the Divisional Court, which led Hodgson J. to the conclusion that the applicants had a strong prima facie case on all three main areas of contention; the wholehearted intervention of the Commission in support of the applicants in Case 221/89, when the Commission (unlike the member states that intervened on both sides) had no vested interest; the subsequent judgment in *Agegate*, which must render the residence condition in section 14 of the Act of 1988 almost impossible to defend; and the interim order of the European Court, made after hearing arguments identical to those advanced by the Secretary of State in this case, which confirmed not only that the applicants had a prima facie case but also, it would seem, that the Secretary of State had not.

The Secretary of State's arguments as to discretion (see [1990] 2 A.C. 85, 118–119) are all "blockers" under another name: they are to the effect that there can be no injunction against the Crown or against an Act of Parliament. [Reference was made to *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130, 136–137.]

Absent the "constitutional enormity" referred to by Bingham L.J. in the Court of Appeal [1989] 2 C.M.L.R. 353, 407—but there are

enormities both ways—the Divisional Court and Court of Appeal judges were all one way on the question of discretion, and the course for the House of Lords should be to restore their order. [Reference was made to the Merchant Shipping Act 1988 (Amendment) Order 1989 (S.I. 1989 No. 2006), art. 3.]

National rules, whether obligatory or discretionary, have now, in the light of the European Court's judgment, to be set aside. The applicants are entitled to have their appeal allowed and the order of the Divisional Court reinstated or some other like order made.

Nicholas Forwood Q.C. for the ninety-fifth applicants, Rawlings (Trawling) Ltd. The ninety-fifth applicants endorse everything that has been said on behalf of the first to ninety-fourth applicants as regards general considerations in relation to the European Court judgment and the general consequences. It follows that the Divisional Court was right, in the situation then before it, to exercise its discretion to grant interim relief.

The factors specific to the ninety-fifth applicants are that they are currently fishing and an application by them to be put on the register has been granted. They seek now to be put in the same position as the other applicants. The relief currently being sought by all applicants would remove the effects of the restriction as regards both nationality and domicile. The ninety-fifth applicants want that removal, which might benefit them. Public interest considerations clearly have no application in their case: they are acknowledged not to be part of the mischief.

Sir Nicholas Lyell Q.C., S.-G., John Laws, Stephen Richards and *Andrew Macnab* for the Secretary of State. The European Court in the instant case did not decide that the national court was obliged to grant interim relief in the circumstances set out in the House of Lords' question, nor did it specify what criteria should be applied in determining whether such relief should be granted. It left to the national court the questions what criteria should be applied; whether any interim relief should be granted; and, if so, on what terms it should be granted; but it ruled that, once the national court had decided that such relief should be granted but for a jurisdictional rule that prevented it from doing so, the national court must set aside any such jurisdictional rule. It adopted a "minimalist" approach: it simply said that there must not be a national rule that prohibited the exercise of discretion. It did not say that the national court must exercise the discretion in the applicant's favour. It did not say that there *must* be a remedy. One should not draw more from *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case 106/77) [1978] E.C.R. 629 than is warranted.

The House of Lords is, therefore, now required to address the question of fundamental importance, that was left outstanding in its previous judgment [1990] 2 A.C. 85, namely, what considerations the courts must take into account in granting interim relief that includes setting aside the provisions of an Act of Parliament and is contrary to the rule that no injunction may be granted against the Crown. The House of Lords is obliged to rule on the criteria and considerations to be applied in deciding whether to grant interim relief, and on the application of those considerations to the facts as they now stand. The

A House of Lords must look at the facts and law as they stand today. Any decision by it would irrevocably determine the position in the period until the European Court rules on the substantive issue. The legal considerations are of fundamental importance because the new powers conferred on the courts are of great significance and guidance on the exercise of such powers is necessary.

B In an ordinary case, the purpose of an interlocutory injunction is clear: to "hold the ring," or preserve, as best the court may, the position of both parties until their rights or obligations are established at trial: see *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, 406D–F and *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85, 139E–H. In the present case, no question of "holding the ring" can possibly arise: see [1990] 2 A.C. 85, 142G—143B.

C The consideration differentiating the present case from what is the usual situation in applications for interim relief is not, however, merely a function of the particular facts in play in the present case. Whenever an applicant claims that he has Community legal rights that are denied him by a United Kingdom statute (or subordinate legislation), and there is an article 177 reference on the question, any grant of interim relief

D pending the ruling of the European Court will entail, at least, (a) that the claimant, during the interim period, may enjoy the right he claims as if it were already established, whereas it is merely putative; and (b) that the legal position that the legislature (whether sovereign or secondary) intended to establish, which is likely to involve the grant of rights to others, will be to some extent abrogated. Neither (a) nor (b) can be described as a merely *provisional* position, capable of being recalled or

E corrected on the delivery of final judgment. Neither the claimant's enjoyment (for the interim period) of his claimed right, nor the abrogation (for the same period) of the legislature's effects, can be recalled. This is not merely a proposition of fact: unless the case is one in which a cross-undertaking in damages could sensibly be required (which here, and in perhaps all cases, it could not), it is a necessary

F truth. Thus, the effect of the interim order is actually to grant final relief in relation to the period up to judgment, and in a case like the present that final relief will diminish the value of the rights of persons that are in no sense putative but vested and undeniable.

The issue in the substantive proceedings in a case like the present is one of law, not fact: see [1990] 2 A.C. 85, 140B–F. It follows, therefore,

G that the ultimate decision of the case will not depend on proof of facts that are at present unresolved and as to which the court at present lacks the material to form any confident view. Where, as in the ordinary case, that is the position, the court has no interest in going on the basis that one side's account of the facts is more likely to turn out to be right than the other's: it simply recognises that there is a serious issue to be tried and proceeds to judge the balance of convenience. That is a natural and

H appropriate exercise in such circumstances.

If on the application for interlocutory relief the court is by contrast presented, as it will always be in cases like this, with two views of the law between which it cannot then and there finally decide because the

question is being referred under article 177, wholly different considerations arise. The court in deciding whether to grant interim relief is bound to choose between two alternative positions: either the applicant's contention as to the law is in the meantime to be treated for all the world as being correct, or the respondent's contention is to be so treated. The question, therefore, that it has to answer is as to which legal régime shall prevail until final determination of the issue. In the ordinary case, however, the court is not faced with the question of what facts are to be assumed to be true in the meantime. It makes no such assumptions. It follows that there is an issue of principle as to what the court's approach should be in deciding which legal régime to validate on an interim basis, and the jurisprudence concerning interlocutory injunctions in the typical case affords no guidance on the question.

There is, in general terms, an elementary public interest in seeing that statute law (whether primary or secondary) is upheld. As a function of this, it is a settled principle of English law that a legislative act, proper in form, enjoys a presumption of validity: *Smith v. East Elloe Rural District Council* [1956] A.C. 736 and *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295. This is a factor that has no analogy in the ordinary case of interlocutory relief: there is no presumption that what a defendant in a private law suit has done (or intends to do) to the plaintiff is legally justified. The approach to the position that may potentially arise on a domestic law challenge to the vires of a statutory instrument (in which no issue of Community law arises) is grounded on well settled principles, none the less so because it is a different approach than that propounded in *American Cynanamid Co. v. Ethicon Ltd.* [1975] A.C. 396 in relation to private law litigation. There is then the question whether there should or might be any different approach where the complaint is that legislation, whether primary or secondary, is on its face inconsistent with Community law. There can be no basis for a distinction in principle between the two cases. All the factors that militate against any interim relief against a statutory instrument apply with at least equal force to the European case. The presumption of validity does not deprive the court of jurisdiction to grant interim relief against a legislative measure, since such a position is contradicted by the recent ruling of the European Court; but the public interest reasons that underlie that presumption speak loud as to the proper approach of the court to its discretion, now vouchsafed by the European Court, whether to grant such relief.

The principles that the court should apply in a case like the present are as follows. (1) The factors pointing against the grant of relief, which are of systematic and not merely contingent application, are so strong as to give rise to a principle that the court will presume against the grant of relief. Exceptional circumstances will have to be shown if the presumption is to be set aside.

(2) Proof that the applicant will, absent an injunction, suffer irrecoverable damage cannot of itself amount to an exceptional circumstances. Such irrecoverable damage can only exist on the premise that the applicant's substantive contention as to the law is to be taken as correct: if it is not correct, he has suffered no damage cognisable in law.

A (3) The court must at least be satisfied that the applicant's substantive case is more likely to be right than the respondent's. If the matter is evenly balanced, or the respondent's case appears stronger, the measure under challenge should be left in place until final trial: this does no more than recognise that the public interest ordinarily requires legislation to be presumed to be valid.

B (4) The court must be especially slow to grant interim relief since its effect is to dispose finally of the rights of the parties in relation to the period elapsing before the European Court gives its ruling: the true position is that, if the relief is granted, then whatever the European Court rules, there will never be a trial that will affect the question whether the applicants may be allowed to enjoy, at the expense of others, the rights that they claim in respect of that period. This is C fundamentally different from the situation that obtains on the grant of an interlocutory injunction in the ordinary case, where the plaintiff gives a cross-undertaking in damages. There, in the eye of the law, the defendant's putative legal right, apparently overborne by the injunction, is preserved by the undertaking. The undertaking is as good as the right itself and represents it: there is no finality.

D (5) The court should take into account the attitude of the Commission to its own discretion to bring infraction proceedings under article 169 and to seek interim measures under article 186. It is made the guardian of the treaty under article 155.

(6) The usual factors relevant to the exercise of the court's discretion to grant interim relief, such as the requirement of clean hands, apply at least with equal force in this context. In particular, E where a mandatory order is sought, the court will generally be slow to grant it: see, for example, *Locabail International Finance Ltd. v. Agroexport* [1986] 1 W.L.R. 657, 664A–D.

(7) In so far as any balance falls to be struck, the court must be satisfied that the consequences for the applicants if no relief is granted would be so much graver than the consequences to those with F established rights if relief is granted as to amount to a wholly exceptional cicumstance, and even then relief should not be given unless the court firmly concludes that the public interest in maintaining the measure in effect until final judgment should take second place.

Fifteen months have elapsed since the judgment of the Divisional Court of 10 March 1989, and the legal and factual situations are now G materially different. It would be wrong in principle for the court to close its eyes to such developments when considering the exercise of a discretion to grant interim relief. As to factual developments, reliance is placed on additional affidavit evidence sworn on behalf of the Secretary of State. The evidence shows that an interim order in favour of the applicants would seriously interfere with the exercise of vested and undeniable rights enjoyed by the operators of genuine H British fishing vessels and would cause the British fishing fleet serious and uncompensatable damage. As to the introduction of fresh evidence, see *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130, 137E–G.

As to the legal developments, the "nationality" issue is no longer a live one for the purposes of the present application, since the Act of 1988 was amended with effect from 2 November 1989 in order to give effect to the interim Order of the President of the Court of Justice in *Commission of the European Communities v. United Kingdom* (Case 246/89 R) [1989] E.C.R. 3125. So far as concerns the issues of "residence" and "domicile," the substantive arguments, including those concerning the competence of a member state to determine who can fly its flag, are similar to those that arise in respect of "nationality," though it should be stressed that the United Kingdom's substantive arguments on "nationality" continue to be pressed in the main proceedings before the European Court. The judgment of the European Court in *Reg. v. Ministry of Agriculture, Fisheries and Food, Ex parte Agegate Ltd.* (Case C 3/87) [1990] 2 Q.B. 151 does not undermine the United Kingdom's case. So far as the issue of "direction and control" is concerned, the Crown's case is supported by the judgment of the European Court in *Reg. v. Ministry of Agriculture, Fisheries and Food, Ex parte Jaderow Ltd.* (Case C 216/87) [1990] 2 Q.B. 193, which held, inter alia, that a member state was entitled to require a vessel to have a real economic link with that state for the purpose of fishing against that state's quotas. The precise significance of the judgments in *Agegate* and *Jaderow* is a matter of dispute and remains to be determined, and the European Court has yet to make a substantive ruling on the specific issues raised in the present case. Accordingly, great caution needs to be exercised in the use of those judgments.

The United Kingdom's arguments in the main proceedings still pending before the European Court included the following. Community law does not affect the sovereign right of a member state to lay down the conditions for the grant of its flag to ships. The requirements laid down in the Act of 1988 govern access to the British flag. The purpose of Part II of the Act was to ensure that (i) British fishing vessels had a real economic link with the United Kingdom; (ii) the United Kingdom was able to exercise effective jurisdiction over vessels flying its flag; (iii) the United Kingdom quotas granted under the common fisheries policy enured to the benefit of the genuine British fishing fleet.

The grant of the flag gives rise to legal and international obligations. It (a) engages the state in question in real and far-reaching international obligations and (b) asserts the jurisdiction of that state over the ship and those on board in civil, criminal, operational and employment matters: see article 94 of the 1982 Convention on the Law of the Sea. Similar provisions apply, mutatis mutandis, to aircraft. The grant of the flag is intrinsically an act of sovereignty, and, in the absence of any express provision in the Treaty and any power for the Community to assume direct legal and international responsibility for vessels registered in the member states, it is not to be presumed that the Treaty interferes with the exercise of a state's sovereign power.

Customary international law, as expressed in article 5(1) of the 1958 Geneva Convention on the High Seas, requires a genuine link between a vessel and the state whose flag it flies. The nationality of owner criterion is a means of ensuring a genuine link between the vessel and the state whose flag it flies. Such a criterion is recognised in international law: article 5(1) of the 1958 Geneva Convention on the High Seas and the commentary thereon by the International Law Commission, the corresponding provision in the 1982 United Nations Convention on the Law of the Sea and article 8 of the 1986 Convention on Conditions for Registration of Ships. The other requirements, e.g. as to residence, of the Act of 1988 seek to reinforce the genuine link. Community law does not take precedence over customary international law (cf. article 234 of the Treaty); rather, customary international law is a source of Community law: *van Duyn v. Home Office* (Case 41/74) [1974] E.C.R. 1337, 1350–1351.

The principle of non-discrimination in article 7 of the Treaty presupposes the existence of the concept of nationality. The attribution of nationality necessarily involves differentiation among persons connected with member states. Article 7 does not prevent a member state from deciding who is eligible to be its nationals or from deciding which vessels or aircraft are able to fly its flag. The grant of the flag does not impede the right of establishment under article 52. In merchant shipping generally, nationals of, or companies controlled by nationals of, other member states can be fully established in the United Kingdom operating vessels under their flag of origin. The same is true of fishing save that fishing activities cannot be carried on with access to the United Kingdom fishing quotas established under the common fisheries policy. The grant of the flag is not within the recognised categories of establishment: no mention of it is made in the General Programme for the abolition of restrictions on freedom of establishment (Official Journal 1962 No. 36). The right of establishment includes the right of secondary establishment, i.e., to have more than one establishment: *Ordre des Avocats au Barreau de Paris v. Klopp* (Case 107/83) [1985] Q.B. 711; [1984] E.C.R. 2971. In the case of the flag, such a right would be absurd. Community law does not allow persons to invoke article 52 for reasons that are not legitimate under Community law. To seek to rely on article 52 to evade and/or exploit the quota system under the common fisheries policy is an abus de droit: see, by analogy, *Reg. v. Her Majesty's Treasury, Ex parte Daily Mail and General Trust Plc.* (Case 81/87) [1989] Q.B. 446, opinion of Mr. Advocate General Darmon and judgment. If articles 7 and 52 did render illegal the registration conditions in the Act of 1988, including the nationality of owner criterion, that would have startling consequences for maritime and air transport generally. It would render otiose the transitional provisions in Council Regulation (E.E.C.) No. 4055/86 (Official Journal 1986 No. L.378/1) on phasing out national flag reservations for the maritime carriage of goods between member states and between member states and third countries. National airlines of member states would be able to obtain

the flag of all other member states and then be eligible to operate internal air services within each member state on the same conditions as local airlines. This would undermine the purpose of article 61 of the Treaty.

It is settled law that the quota system constitutes a permitted derogation from the principle of equal access: *Romkes v. Officier van Justitie for the District of Zwolle* [1987] E.C.R. 2671 and *Jaderow* [1990] 2 Q.B. 193, 221–222, para. 24. The registration rules in the Act of 1988 are intended to prevent abuse of the freedoms of the Treaty to gain unfair advantage of the Community quota system, which is designed to protect the local fishing communities of each member state. The long and arduous negotiations leading up to the quota system established by Council Regulation (E.E.C.) No. 170/83 were based on the legitimate expectation that the concepts of "flying the flag" or "registered in a member state," which are not defined in the E.E.C. Regulations, would remain within the competence of the member states, who would continue to be free to lay down rules on access to the flag in conformity with international law. Thus the quota system would not be undermined.

The preliminary points in *Agegate* [1990] 2 Q.B. 151 and *Jaderow* were specifically concerned with the powers granted to member states under article 5(2) of Council Regulation (E.E.C.) No. 170/83 to adopt licensing conditions governing the pattern of operation of a fishing vessel. The European Court did not have to address its mind to rules on access to the flag. In particular, no consideration was given to the question whether the establishment of the quota system by reference to the concept of "flying the flag" and "registered in a member state" meant that member states had lost their right under international law to determine registration rules of fishing vessels. It was made clear by the court in both cases (see paragraphs 17 and 18 of the judgment in *Jaderow*, at p. 220, and paragraphs 16 and 17 of the judgment in *Agegate*, at p. 187) that national quotas were linked to vessels flying the flags of the member states in question and that the licensing conditions being discussed were those that might be attached to the licence to fish granted to vessels *in the fishing fleet* of the member state. They were, therefore, licensing conditions attached to those already entitled to fly the flag. It is important that there should be a real link with the member state so as to ensure that quotas are realistic and to make policing more real. It is easier to police people whose genuine base is in the member state.

The right of member states to lay down their own registration rules in a manner compatible with international law was an essential foundation of the common fisheries policy. Were it otherwise, the whole basis of the policy would be destroyed. The requirements of residence, domicil and direction and control are essential to ensure the real economic link, and are encompassed within the same general arguments. Nationality in itself would not always ensure that there is a real economic link between the vessel and its flag member state. The residence, domicil and place of direction and control requirements do not discriminate on grounds of nationality. A member state is

A entitled to impose residence requirements if they are for a legitimate purpose: *Robert Fearon & Co. Ltd. v. Irish Land Commission* (Case 182/83) [1984] E.C.R. 3677.

The order for which the applicants contend, if ultimately upheld at trial, produces the result that it would be the obligation of the United Kingdom, and of every member state, to be prepared to register as a fishing vessel any vessel owned by any member of the Community B notwithstanding where he resided, managed the vessel and directed and controlled it. Fishermen would thus have an unrestricted right to choose under which flag to fish. That would undercut the whole common fisheries policy with regard to sharing out available stocks.

Vaughan Q.C. in reply. *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295 was an C interlocutory case. It was not in a state for anyone to make a decision. Here, the matter came on for final trial. It would be wrong to bring in a higher standard than in other cases to deal with a Community matter of this nature. The burden should not be put too high on the applicant in a Community law case. [Reference was made to *Smith v. Inner London Education Authority* [1978] 1 All E.R. 411; D *Sierbien v. Westminster City Council* (1987) 86 L.G.R. 431 and *Films Rover International Ltd. v. Cannon Film Sales Ltd.* [1987] 1 W.L.R. 670.] Here, the Divisional Court found that the damage and injustice would be all one way. Bingham L.J. in the Court of Appeal [1989] 2 C.M.L.R. 353, 405, said that the case for granting interlocutory relief was "very strong, if not overwhelming." It is not necessary, in that case, to weigh the applicants' chances of success too nicely. As to E injustice, the obtrusiveness of the order sought (e.g. an order to pull a house down) is also relevant: see *Films Rover.* It is prima facie contrary to Community law to have these requirements.

It is clear that those who have gone fishing have done so out of desperation. Their irreparable losses will be overwhelming. They are very unlikely to get a decision from the European Court in the F substantive proceedings before Easter 1991.

As to the Secretary of State's seven principles, this case is different from the ordinary *American Cyanamid* case [1975] A.C. 396, but the proper place in which to take this into account is in the balancing exercise. It is exceptional to grant relief in this sort of case, but this does not mean that it cannot be granted. The court should look at G *Locabail International Finance Ltd. v. Agroexport* [1986] 1 W.L.R. 657 in the light of *Films Rover*, not just by itself. The principles are put much too high; as they stand, it would be almost impossible for anyone to get any protection. The real questions are whether there is irrecoverable damage, whether the applicants can be protected in any way and how this is to be done. Under the European Court judgment, H the principle to be safeguarded is that of full effectiveness from the moment of application.

Their Lordships took time for consideration.

11 October. LORD BRIDGE OF HARWICH. My Lords, when this appeal first came before the House last year (*Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85) your Lordships held that, as a matter of English law, the courts had no jurisdiction to grant interim relief in terms which would involve either overturning an English statute in advance of any decision by the European Court of Justice that the statute infringed Community law or granting an injunction against the Crown. It then became necessary to seek a preliminary ruling from the European Court of Justice as to whether Community law itself invested us with such jurisdiction. In the speech I delivered on that occasion, with which your Lordships agreed, I explained the reasons which led us to those conclusions. It will be remembered that, on that occasion, the House never directed its attention to the question how, if there were jurisdiction to grant the relief sought, discretion ought to be exercised in deciding whether or not relief should be granted.

In June of this year we received the judgment of the European Court of Justice (Case C 213/89), ante, pp. 640 et seq., replying to the questions we had posed and affirming that we had jurisdiction, in the circumstances postulated, to grant interim relief for the protection of directly enforceable rights under Community law and that no limitation on our jurisdiction imposed by any rule of national law could stand as the sole obstacle to preclude the grant of such relief. In the light of this judgment we were able to conclude the hearing of the appeal in July and unanimously decided that relief should be granted in terms of the orders which the House then made, indicating that we would give our reasons for the decision later.

My noble and learned friend, Lord Goff of Chieveley, whose speech I have had the advantage of reading in draft, has given a very full account of all the relevant circumstances arising since our decision last year in the light of which our final disposal of the appeal fell to be made. I gratefully adopt this account. I also agree with his exposition of the principles applicable in relation to the grant of interim injunctive relief where the dispute involves a conflict between private and public interests and where damages are not a remedy available to either party, leading, in the circumstances of this case, to the conclusion that it was appropriate to grant relief in terms of the orders made by the House. But I add some observations of my own in view of the importance of the subject matter.

Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty (Cmnd. 5179-II) it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom

joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

Although affirming our jurisdiction, the judgment of the European Court of Justice does not fetter our discretion to determine whether an appropriate case for the grant of interim relief has been made out. While agreeing with Lord Goff's exposition of the general principles by which the discretion should be guided, I would wish to emphasise the salient features of the present case which, at the end of the argument, left me in no doubt that interim relief should be granted. A decision to grant or withold interim relief in the protection of disputed rights at a time when the merits of the dispute cannot be finally resolved must always involve an element of risk. If, in the end, the claimant succeeds in a case where interim relief has been refused, he will have suffered an injustice. If, in the end, he fails in a case where interim relief has been granted, injustice will have been done to the other party. The objective which underlies the principles by which the discretion is to be guided must always be to ensure that the court shall choose the course which, in all the circumstances, appears to offer the best prospect that eventual injustice will be avoided or minimised. Questions as to the adequacy of an alternative remedy in damages to the party claiming injunctive relief and of a cross-undertaking in damages to the party against whom the relief is sought play a primary role in assisting the court to determine which course offers the best prospect that injustice may be avoided or minimised. But where, as here, no alternative remedy will be available to either party if the final decision does not accord with the interim decision, choosing the course which will minimise the risk presents exceptional difficulty.

If the applicants were to succeed after a refusal of interim relief, the irreparable damage they would have suffered would be very great. That is now beyond dispute. On the other hand, if they failed after a grant of interim relief, there would have been a substantial detriment to the public interest resulting from the diversion of a very significant part of the British quota of controlled stocks of fish from those who ought in law to enjoy it to others having no right to it. In either case, if the final decision did not accord with the interim decision, there

would have been an undoubted injustice. But the injustices are so different in kind that I find it very difficult to weigh the one against the other.

If the matter rested there, I should be inclined to say, for the reasons indicated by Lord Goff of Chieveley, that the public interest should prevail and interim relief be refused. But the matter does not rest there. Unlike the ordinary case in which the court must decide whether or not to grant interlocutory relief at a time when disputed issues of fact remain unresolved, here the relevant facts are all ascertained and the only unresolved issues are issues of law, albeit of Community law. Now, although the final decision of such issues is the exclusive prerogative of the European Court of Justice, that does not mean that an English court may not reach an informed opinion as to how such issues are likely to be resolved. In this case we are now in a position to derive much assistance in that task from the decisions of the European Court of Justice in *Reg. v. Ministry of Agriculture, Fisheries and Food, Ex parte Agegate Ltd.* (Case C 3/87) [1990] 2 Q.B. 151 and *Reg. v. Ministry of Agriculture, Fisheries and Food, Ex parte Jaderow Ltd.* (Case C 216/87) [1990] 2 Q.B. 193 and the interim decision of the President in the proceedings brought by the European Commission against the United Kingdom (*Commission of the European Communities v. United Kingdom* (Case 246/89 R) [1989] E.C.R. 3125) to which Lord Goff of Chieveley has referred. In the circumstances I believe that the most logical course in seeking a decision least likely to occasion injustice is to make the best prediction we can of the final outcome and to give to that prediction decisive weight in resolving the interlocutory issue.

It is now, I think, common ground that the quota system operated under the common fisheries policy, in order to be effective and to ensure that the quota of a member state enures to the benefit of its local fishing industry, entitles the member state to derogate from rights otherwise exerciseable under Community law to the extent necessary to ensure that only fishing vessels having a genuine economic link with that industry may fish against its quota. The narrow ground on which the Secretary of State resists the applicants' claim is that the requirements of section 14 of the Merchant Shipping Act 1988 that at least 75 per cent. of the beneficial ownership of a British fishing vessel must be vested in persons resident and domiciled in the United Kingdom is necessary to ensure that the vessel has a genuine economic link with the British fishing industry. Before the decision of the European Court of Justice in *Agegate* that would have seemed to me a contention of some cogency. But in *Agegate* it was held that a licensing condition requiring 75 per cent. of the crew of a vessel fishing against the quota of a member state to be resident within the member state could not be justified on the ground that it was "irrelevant to the aim of the quota system:" p. 261. I confess that I find some difficulty in understanding the reasoning in the judgment which leads to this conclusion. But if a residence requirement relating to crew members cannot be justified as necessary to the maintenance of a genuine economic link with the local industry, it is difficult to see

how residence or domicile requirements relating to beneficial owners could possibly fare any better.

The broader contention on behalf of the Secretary of State that member states have an unfettered right to determine what ships may fly their flag raises more difficult issues. It would not be appropriate in the context of the present interlocutory decision to enter upon a detailed examination of the wide-ranging arguments bearing upon those issues. I believe the best indication that we have of the prospect of success of that contention is found in the interlocutory judgment of President Due in the case brought by the Commission against the United Kingdom. He concluded that the contention was of insufficient weight to preclude him from granting an interim order suspending the application of the nationality requirements of section 14 of the Act of 1988 to nationals of other member states. His reasoning persuaded me that we should reach the same conclusion in relation to the residence and domicile requirements.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech produced by my noble and learned friend, Lord Goff of Chieveley, and agree with it entirely.

LORD OLIVER OF AYLMERTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Goff of Chieveley. I agree with it and, for the reasons given by my noble friend, I, too, would allow this appeal.

LORD GOFF OF CHIEVELEY. My Lords, this appeal was last before your Lordships' House in May 1989. The subject matter of the proceedings is an application by the applicants for judicial review, challenging the legality of certain provisions of the Merchant Shipping Act 1988, and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 (S.I. 1988 No. 1926), on the ground that they contravene provisions of European law. The matter came before a Divisional Court (Neill L.J. and Hodgson J.) (*Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1989] 2 C.M.L.R. 353), who requested a preliminary ruling from the European Court of Justice under article 177 of the E.E.C. Treaty on the questions necessary to enable them finally to determine the application. They then made an order for interim relief in the form of an order that in the meanwhile Part II of the Act of 1988 and the Regulations be disapplied and the Secretary of State for Transport be restrained from enforcing the same in respect of any of the applicants and any vessel now owned (in whole or in part), managed, operated or chartered by any of them so as to enable registration of any such vessel under the Merchant Shipping Act 1894 and/or the Sea Fishing Boats (Scotland) Act 1886 to continue in being. The Court of Appeal [1989] 2 C.M.L.R. 353 allowed an appeal by the Secretary of State from the interim order of the Divisional Court. On appeal by the applicants to your Lordships' House [1990] 2 A.C. 85, it was held by your Lordships that, as a matter of English law, the English courts had no power to

make such an order as that made by the Divisional Court. My noble and learned friend, Lord Bridge of Harwich, said of the order for interim relief, at pp. 142–143:

> "Any such order, unlike any form of order for interim relief known to the law, would irreversibly determine in the applicants' favour for a period of some two years rights which are necessarily uncertain until the preliminary ruling of the E.C.J. has been given. If the applicants fail to establish the rights they claim before the E.C.J., the effect of the interim relief granted would be to have conferred upon them rights directly contrary to Parliament's sovereign will and correspondingly to have deprived British fishing vessels, as defined by Parliament, of the enjoyment of a substantial proportion of the United Kingdom quota of stocks of fish protected by the common fisheries policy. I am clearly of the opinion that, as a matter of English law, the court has no power to make an order which has these consequences."

Your Lordships' House further held that, in any event, there was no jurisdiction in English law to grant an interim injunction against the Crown; this provided an additional reason why the order made by the Divisional Court could not be supported. Your Lordships' House however sought the guidance of the European Court of Justice on the question whether, in a case such as the present, European law overrides English law. Accordingly the following questions were referred to the court:

> "1. Where—(i) a party before the national court claims to be entitled to rights under Community law having direct effect in national law ('the rights claimed'), (ii) a national measure in clear terms will, if applied, automatically deprive that party of the rights claimed, (iii) there are serious arguments both for and against the existence of the rights claimed and the national court has sought a preliminary ruling under article 177 as to whether or not the rights claimed exist, (iv) the national law presumes the national measure in question to be compatible with Community law unless and until it is declared incompatible, (v) the national court has no power to give interim protection to the rights claimed by suspending the application of the national measure pending the preliminary ruling, (vi) if the preliminary ruling is in the event in favour of the rights claimed, the party entitled to those rights is likely to have suffered irremediable damage unless given such interim protection, does Community law either (a) oblige the national court to grant such interim protection of the rights claimed; or (b) give the court power to grant such interim protection of the rights claimed? 2. If question 1(a) is answered in the negative and question 1(b) in the affirmative, what are the criteria to be applied in deciding whether or not to grant such interim protection of the rights claimed?"

On 19 June 1990, in answer to the questions so referred to it, the court ruled as follows, ante, p. 644:

A ". . . Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule."

Following receipt of that ruling, the applicants returned to your B Lordships' House on 2 July 1990 in order to pursue further their appeal from the decision of the Court of Appeal and to seek interim relief pending the determination by the European Court of Justice of the matters referred to it by the Divisional Court. However, for reasons which will appear, they sought interim relief in a form different from that ordered by the Divisional Court. On 9 July, shortly after the conclusion of the hearing, your Lordships announced C the House's decision to grant interim relief, and an order was made by your Lordships for an interim injunction in the following terms:

"Pending final judgment or further order herein the Secretary of State whether by himself his servants or agents or otherwise howsoever be restrained from withholding or withdrawing registration in the register of British fishing vessels maintained by D him pursuant to the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 in respect of any of the vessels specified in the first column of the schedule hereto by reason only of the following: (a) legal title or beneficial ownership of such vessel is vested in whole or in part in the person or persons listed against its name in the second column of the said schedule; and (b) (i) in the case of any natural person so listed, that person is resident or E domiciled in a member state of the European Economic Community other than the United Kingdom; or (ii) in the case of any company so listed, (aa) 25 per cent. or more of the shares or of any class of the shares of that company, or of any company owning shares in that company, are legally or beneficially owned by a person or persons resident or domiciled in a member state of F the European Economic Community other than the United Kingdom or (bb) 25 per cent. or more of the directors of that company, or of any company holding shares in that company, are resident or domiciled in a member state of the European Economic Community other than the United Kingdom."

Provision was made for liberty to apply. It was indicated that your G Lordships would publish at a later date your reasons for granting such interim relief. I now set out the reasons which caused me to agree that such relief should be granted.

When your Lordships decided to make the reference to the European Court of Justice in this matter in May 1989, my noble and learned friend, Lord Bridge of Harwich, delivered a speech with which the remainder of your Lordships, including myself, agreed. In H his speech on that occasion, my noble and learned friend was concerned primarily with the jurisdiction of the English courts to grant an interim injunction in a case such as the present as a matter of English law. Even so, he gave a full account of the background to

from, the judgment of Neill L.J. in the Divisional Court, and in particular his account of the common fisheries policy); and his consideration of the question whether, as a matter of English law, the court had jurisdiction in the present case to grant interim relief inevitably touched upon the question which your Lordships now have to address in the light of the ruling of the European Court of Justice. In these circumstances, it would be repetitious if I once again set out the background to the present appeal: I shall only do so to the extent necessary to set in their context certain decisions of the European Court of Justice. Furthermore I wish to stress that, in expressing my reasons why in my opinion your Lordships should grant interim relief, I have no intention of departing from anything contained in the speech of my noble and learned friend, with which I have expressed my complete agreement.

The question which arose for consideration by your Lordships, following the ruling of the European Court of Justice, concerned the appropriateness of an order for an interim injuction in a case such as the present, which is concerned with a challenge to the lawfulness of an Act of Parliament as being incompatible with European law. This inevitably raised for consideration the principles to be applied in the case of an application for such an interim injunction, and in particular the extent to which the principles stated by your Lordships' House in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C 396 are applicable in such a case, a matter upon which my noble and learned friend made some observations in his speech upon the first hearing of the appeal. I have however to say at once that your Lordships were not concerned with the simple question whether to interfere with the exercise of discretion by the Divisional Court in favour of granting an injunction. This is for three reasons. First, after the Divisional Court made its order, as I have already indicated, circumstances occurred which rendered an order in that form inappropriate. The purpose of the order was to continue in being the registration of the applicants' fishing vessels under the Act of 1894 and/or the Act of 1886. However, during the period which elapsed since the Divisional Court made its order, the register maintained under the Act of 1894 was closed. It was for this reason that the applicants sought an injunction in a different form, directed towards restraining the Secretary of State from withholding or withdrawing registration of their vessels in the register maintained under the Act of 1988 on certain grounds which, in the applicants' submission, were incompatible with European law—an injunction which your Lordships decided to grant. Second, important legal developments had taken place since the Divisional Court's order. Two judgments were delivered by the European Court of Justice concerning the validity of certain conditions imposed by the Secretary of State on the grant of licences to fishing vessels (*Reg. v. Ministry of Agriculture, Fisheries and Food, Ex parte Agegate Ltd.* (Case C 3/87) [1990] 2 Q.B. 151 and *Reg. v. Ministry of Agriculture, Fisheries and Food, Ex parte Jaderow Ltd.* (Case C 216/87) [1990] 2 Q.B. 193), and an interim order was made by the President of the European Court of Justice, on an application by the

President of the European Court of Justice, on an application by the European Commission, regarding certain nationality provisions in section 14 of the Act of 1988: *Commission of the European Communities v. United Kingdom* (Case 246/89 R) [1989] E.C.R. 3125. The latter order was of particular relevance to the applicants' application for an interim injunction in the present case. Third, there had been certain factual developments since the last hearing before your Lordships, which were the subject of evidence. In these circumstances, it was inevitable that your Lordships' House should consider the applicants' application de novo, and that it should, for that purpose, consider in some depth the applicable principles.

Before turning to those applicable principles, I shall briefly summarise the effect of the intervening decisions of the European Court and of its President. The present appeal is, of course, concerned with the question whether certain provisions of the Act of 1988 are compatible with European law. The same is true of the interim order of the President, but not of the two decisions of the court. Those decisions, which I shall refer to as the *Agegate* and *Jaderow* cases, were concerned with the validity of certain conditions imposed upon the grant of licences for British fishing vessels. They are not, therefore, of such direct relevance to the present appeal as the President's interim order. They have, however, some bearing upon the present appeal, and I think it desirable to refer to them; and I propose to set them in their context, even though this may involve some repetition of matters already recorded in the speech of my noble and learned friend, Lord Bridge of Harwich.

Under the Sea Fish (Conservation) Act 1967, as subsequently amended, fishing vessels registered in the United Kingdom are required to have a licence. That Act was supplemented by certain legislation in 1983—the British Fishing Boats Act 1983, and the British Fishing Boats Order 1983 (S.I. 1983 No. 482) and the Sea Fish Licensing Order 1983 (S.I. 1983 No. 1206). This legislation was passed in an attempt to meet the situation created during the previous two or three years by the registration of Spanish fishing vessels as British fishing vessels, with a view to acquiring the same rights to fish in Community waters as those to which British fishing vessels beneficially owned by British nationals were entitled. Such registration was perceived as having the effect of circumventing restrictions imposed on Spanish registered vessels under the reciprocal fishing agreement concluded by the European Community with Spain in 1980 (following the Hague resolution of 1976 (Council Regulation of 3 November 1976; Official Journal 1981 No. C 105/1), whereby certain member states of the Community extended their fishing limits in the Atlantic Ocean to 200 miles from the coast); under the reciprocal fishing agreement of 1980, a limited number of Spanish fishing vessels were permitted to fish only for specified quantities of hake in specified waters of member states. It seems that the Spanish fishing vessels saw this as a substantial exclusion from fishing grounds in deep waters previously fished by them, and sought to circumvent the restriction by registering their vessels as British. It was in response to that move

that the legislation of 1983 was introduced, under which a British-registered fishing boat fishing within British fishing limits was required to have a crew consisting of at least 75 per cent. of European Community nationals.

In January 1983, the system of national fish quotas was introduced by Council Regulations (E.E.C.) Nos. 170/83 and 172/83. The British authorities experienced difficulty in monitoring the catches of ex-Spanish-registered vessels, and concern about their activities was being expressed by British fishermen, especially those based in the western parts of the United Kingdom. This concern was being expressed against a background of continued activity by British-registered fishing vessels with a largely Spanish beneficial ownership operating under British registration but mainly from Spain and with only tenuous links with the United Kingdom, which were believed to be making substantial inroads into the fishing opportunities allocated to the United Kingdom under the common fisheries policy in the light of this country's traditional fishing activities.

Accordingly, in December 1985, new licensing conditions for British fishing vessels were announced, taking effect as from 1 January 1986. These related to crewing, social security contributions and operations. The crewing conditions required that at least 75 per cent. of the crew must be British citizens, or E.E.C. nationals (excluding, subject to certain limited exceptions, Greek nationals until 1 January 1988, and Spanish or Portuguese nationals until 1 January 1993) ordinarily resident in the United Kingdom, the Isle of Man or the Channel Islands. The social security conditions required the skipper and all the crew to make contributions to United Kingdom national insurance, or equivalent Isle of Man or Channel Islands schemes. The operating conditions provided as follows:

> "The vessel must operate from the United Kingdom, Isle of Man or Channel Islands; without prejudice to the generality of this requirement a vessel will be deemed to have been so operating if, for each six-month period in each calendar year (i.e. January to June and July to December), either: (a) at least 50 per cent. by weight of the vessel's landings or transhipment of stocks to which this or any other licence in force at the relevant time relates have been landed and sold in the United Kingdom, Isle of Man or the Channel Islands or transhipped by way of sale within British fishery limits; or (b) other evidence is provided of the vessel's presence in a United Kingdom, Isle of Man or Channel Islands port on at least four occasions at intervals of at least 15 days."

The validity of the crewing and social security conditions was challenged in the *Agegate* case [1990] 2 Q.B. 151, and in addition the validity of the operating conditions was challenged in the *Jaderow* case [1990] 2 Q.B. 193. The Advocate General's opinion in both cases was published in November 1988, and so was available at the time of the hearing before the Divisional Court; but the judgment of the European Court of Justice in the two cases was not delivered until 14 December 1989, and

differed in certain important respects from the opinion of the Advocate-General. In the *Agegate* case, the court upheld the validity of the social security condition; but in respect of the crewing condition, while upholding the condition in so far as it required 75 per cent. of the crew to be nationals of member states, the court held that Community law precluded a condition requiring 75 per cent. of the crew to reside ashore in the United Kingdom. In the *Jaderow* case, the court held that Community law did not preclude a member state, in authorising one of its vessels to fish against national quotas, from laying down conditions designed to ensure that the vessel had a real economic link with that state if that link concerned only the relation between that vessel's fishing operations and the population dependent on fisheries and related industries; and, on that basis, the court broadly upheld the validity of the operating conditions imposed by the United Kingdom. These two decisions are significant in the context of the present appeal, in that they provide an indication of the nature of the economic link which the court is prepared to recognise for these purposes, a link which does not extend to include a residence requirement imposed upon 75 per cent. of the vessel's crew.

Meanwhile the United Kingdom Government had come to the conclusion that there was substantial non-compliance with these conditions. Furthermore, the number of largely foreign beneficially owned vessels on the United Kingdom register continued to grow, mainly through the acquisition by Spanish interests of British fishing vessels; Spanish interests were also able to increase the number of licences held by them by acquiring vessels already holding United Kingdom licences. As a result, the problem was considered at a more fundamental level, by looking at the arrangements for registration of United Kingdom fishing vessels; and it was decided to introduce fresh legislation which, it was thought, would bring United Kingdom fishing vessel registration requirements "broadly into line with arrangements in a number of other member states" (see the first affidavit of Mr. Noble of the Ministry of Agriculture, Fisheries and Food) and to require fishing vessels on the United Kingdom register to be substantially owned by British interests. Hence the provisions of Part II of the Act of 1988.

The interim order of the President (Case 246/89 R) [1989] E.C.R. 3125, related to certain provisions of section 14 of the Act of 1988. Other provisions of that section formed the basis of the applicants' application for interim relief before your Lordships' House, and I think it desirable that I should set out the relevant parts of the section. Section 14(1), (2) and (7) provide as follows:

> "(1) Subject to subsections (3) and (4), a fishing vessel shall only be eligible to be registered as a British fishing vessel if—(*a*) the vessel is British-owned; (*b*) the vessel is managed, and its operations are directed and controlled, from within the United Kingdom; and (*c*) any charterer, manager or operator of the vessel is a qualified person or company. (2) For the purposes of subsection (1)(*a*) a fishing vessel is British owned if—(*a*) the legal title to the vessel is vested wholly in one or more qualified persons or companies; and (*b*) the vessel is beneficially owned—(i) as to not less than the

relevant percentage of the property in the vessel, by one or more qualified persons, or (ii) wholly by a qualified company or companies, or (iii) by one or more qualified companies and, as to not less than the relevant percentage of the remainder of the property in the vessel, by one or more qualified persons. . . . (7) In this section—'qualified company' means a company which satisfies the following conditions, namely—(*a*) it is incorporated in the United Kingdom and has its principal place of business there; (*b*) at least the relevant percentage of its shares (taken as a whole), and of each class of its shares, is legally and beneficially owned by one or more qualified persons or companies; and (*c*) at least the relevant percentage of its directors are qualified persons; 'qualified person' means—(*a*) a person who is a British citizen resident and domiciled in the United Kingdom, or (*b*) a local authority in the United Kingdom; and 'the relevant percentage' means 75 per cent. or such greater percentage (which may be 100 per cent.) as may for the time being be prescribed."

The interim order of the President (Case 246/89 R) [1989] E.C.R. 3125 was made upon an application to him by the European Commission. The Commission brought an action under article 169 of the Treaty for a declaration that, by imposing the nationality requirements enshrined in section 13 and 14 of the Act of 1988, the United Kingdom had failed to fulfil its obligations under articles 7, 52 and 221 of the Treaty. The Commission further applied under article 186 of the Treaty and article 83 of the Rules of Procedure for an order requiring the United Kingdom to suspend the application of the nationality requirements enshrined in section 14(1)(*a*) and (*c*) of the Act, read in conjunction with paragraphs (2) and (7) of the section, as regards the nationals of other member states and in respect of fishing vessels which until 31 March 1989 were pursuing a fishing activity under the British flag and under a British fishing licence. Under article 83(2) of the Rules of Procedure, interim measures such as those requested may not be ordered unless there are circumstances giving rise to urgency and factual and legal grounds establishing a prima facie case for the measures applied for.

The President granted the interim order asked for by the Commission. With regard to the issue whether a prima facie case had been established, he said:

"25. The United Kingdom further considers that the nationality requirements introduced by the Act of 1988 are justified by the present Community legislation on fisheries; that legislation, although it establishes a common system, is based on a principle of nationality for the purposes of the distribution of fishing quotas. Under article 5(2) of Council Regulation 170/83 it is for the member states to determine the detailed rules for the utilisation of the quotas allocated to them and thus to lay down the conditions which the vessels authorised to fish from these quotas must satisfy. 26. It must be observed that the system of national quotas established by Council Regulation 170/83 constitutes, as the United Kingdom

contends, a derogation from the principle of equal access for Community fishermen to fishing grounds and the exploitation thereof in waters coming within the jurisdiction of the member states, which is itself a specific expression of the principle of non-discrimination laid down in article 40(3) of the E.E.C. Treaty. 27. That derogation is justified, according to the recitals in the preamble to Regulation No. 170/83, by the need, in a situation where there is a dearth of fishery resources, to ensure a relative stability in regard to fishing activities in order to safeguard the particular need of regions where local populations are especially dependent on fisheries and related industries. 28. The possibility cannot therefore be excluded that in their legislation concerning in particular the registration of fishing vessels and access to fishing activities the member states may be led to introduce requirements whose compatibility with Community law can be justified only by the necessity to attain the objectives of the Community system of fishing quotas. As the Commission itself has admitted in these proceedings, such requirements may be necessary in order to ensure that there is a genuine link with the fishing industry of the member state against whose quota the vessel may fish. 29. However there is nothing which would prima facie warrant the conclusion that such requirements may derogate from the prohibition of discrimination on grounds of nationality contained in articles 52 and 221 of the E.E.C. Treaty regarding, respectively, the right of establishment and the right to participate in the capital of companies or firms within the meaning of article 58. 30. The rights deriving from the above-mentioned provisions of the Treaty include not only the rights of establishment and of participation in the capital of companies or firms but also the right to pursue an economic activity, as the case may be through a company, under the conditions laid down by the legislation of the country of establishment for its own nationals. 31. These rights prima facie also include the right to incorporate and manage a company whose object is to operate a fishing vessel registered in the state of establishment under the same conditions as a company controlled by nationals of that state. 32. As regards the United Kingdom's first submission based on its obligations under international law, it is sufficient to note, at this stage, that in this respect nothing has been put forward which at first sight could necessitate any derogation from the above-mentioned rights under Community law in order to ensure the effective exercise of British jurisdiction and control over the vessels in question. 33. It must therefore be held that, at the stage of these proceedings for the grant of interim relief, the application of the main proceedings does not appear to be without foundation and that the requirement of a prima facie case is thus satisfied."

The President went on to hold that sufficient urgency had also been established; in particular, for fishing vessels hitherto flying the British flag, cessation of their activities could cause serious damage. As regards the balance of interests he had this to say:

"39. Finally, as regards the balance of interests, it is not established that the interim measures applied for may jeopardise the objective pursued by the British legislation at issue, namely to ensure the existence of a genuine link between the vessels fishing against the British quotas and the British fishing industry. 40. It appears prima facie that the registration requirements laid down by the new legislation, other than those relating to nationality, and the measures adopted by the United Kingdom authorities in 1983 and 1986 would be sufficient to ensure the existence of such a link. The United Kingdom itself considers that the 'Anglo-Spanish' vessels, which do not have that link with the United Kingdom, will not be able to satisfy the aforesaid requirements."

Following the President's order, section 14 of the Act of 1988 was amended (by the Merchant Shipping Act 1988 (Amendment) Order 1989 (S.I. 1989 No. 2006)) with effect from 2 November 1989 to give effect to his order until after the final determination of the issue which was the subject of the Commission's substantive application. In section 14(1)(*a*) and (2), the expression "Community-owned" was substituted for "British-owned"; in section 14(7)(*a*), the words "or another state of the European Community" were added after the words "United Kingdom," and in (7)(*c*) the words "or a citizen of a Community state" were added after the words "British citizen." These changes have the effect that the nationality issue ceases to be relevant for the purposes of the present appeal, though the issue is, your Lordships were told, still being vigorously contested by the United Kingdom before the European Court of Justice on the substantive reference by the Divisional Court.

The applicants nevertheless pursued their application for an interim injunction before your Lordships' House, but their complaint was restricted to other matters in section 14. They did not object, for the purposes of the present application, to the requirement, in section 14(1)(*b*), that a vessel should be managed and its operations directed and controlled from within the United Kingdom; they stated that they were able to comply with these requirements. Their complaint was directed towards the requirements for domicile and residence in the United Kingdom contained in the definition of "qualified person" in section 14(7), which apply both to beneficial owners of vessels and, in the case of vessels beneficially owned by companies, both to shareholders and to directors (under section 14(7)(*b*) and (*c*) respectively), with the effect that 75 per cent. of the relevant shareholders and directors are required to be resident and domiciled in the United Kingdom. This, they submitted, is contrary to the right of establishment under article 52 of the Treaty, and the right to participate in capital under article 221. In answer, the Secretary of State submitted that articles 52 and 221 of the Treaty cannot be taken to apply in their full rigour to the fisheries sector. If these articles, and article 7, were so to apply, it would be impossible to prevent fishing interests in one member state registering vessels in another member state in which event it would be impossible (inter alia) to prevent such vessels fishing against the quotas of the latter member state, to the detriment of that member state's fishing community

A and allied industries (who were intended to be protected by the quota system), and also to prevent Spanish vessels avoiding provisions of the Act of Accession of 1985 (Act of Accession of Spain and Portugal, Official Journal 1985 No. L. 302).

It was further submitted by the applicants that the effect of the provisions relating to residence and domicile in section 14, whether or not coupled with the nationality provisions, was to render it impossible B for many of the applicants' vessels to register as British fishing vessels on the register now maintained under the Act of 1988, with possibly catastrophic financial results for their owners. They relied upon the conclusion of Neill L.J. in the Divisional Court that he was not persuaded on the evidence before him that there were identifiable persons or communities whose activities or livelihood were being so C seriously damaged, or would be so seriously damaged, as to outweigh the very obvious and immediate damage which would be caused by these new provisions if no interim relief were granted to the applicants. They submitted fresh evidence to your Lordships as showing that such damage was already being suffered; and they referred to the fact that, on the law as it stands at present (*Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716), the applicants would D have no remedy in damages for loss or damage suffered by them by reason of the enforcement against them of provisions of the Act of 1988 if subsequently held to be incompatible with European law. Finally, it was stated that the judgment of the European Court of Justice on the substantive reference from the Divisional Court was expected in about a year's time, and that it would therefore be for no longer than that E period that interim relief was required.

I turn now to the applicable principles in cases in which an interim injunction is sought, with particular reference to a case such as the present, in which the public interest is involved.

The jurisdiction of courts to grant interim injunctions is to be found in section 37 of the Supreme Court Act 1981, under which the court has power to grant an injunction in all cases in which it appears to it to be F just or convenient so to do, and has power to do so on such terms and conditions as it thinks fit. Guidelines for the exercise of the court's jurisdiction to grant interim injunctions were laid down by your Lordships' House in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, in the speech of Lord Diplock in that case, with which the remainder of their Lordships concurred. I use the word "guidelines" G advisedly, because I do not read Lord Diplock's speech as intended to fetter the broad discretion conferred on the courts by section 37 of the Supreme Court Act 1981; on the contrary, a prime purpose of the guidelines established in the *Cyanamid* case was to remove a fetter which appeared to have been imposed in certain previous cases, viz., that a party seeking an interlocutory injunction had to establish a prima facie case for substantive relief. It is now clear that it is enough if he can H show that there is a serious case to be tried. If he can establish that, then he has, so to speak, crossed the threshold; and the court can then address itself to the question whether it is just or convenient to grant an injunction.

Nothing which I say is intended to qualify the guidelines laid down in Lord Diplock's speech. But, before I turn to the question of public interest, which lies at the heart of the rival submissions in the present case, I must advert to the fact that Lord Diplock approached the matter in two stages. First, he considered the relevance of the availability of an adequate remedy in damages, either to the plaintiff seeking the injunction or to the defendant in the event that an injunction is granted against him. As far as the plaintiff is concerned, the availability to him of such a remedy will normally preclude the grant to him of an interim injunction. If that is not so, then the court should consider whether, if an injunction is granted against the defendant, there will be an adequate remedy in damages available to him under the plaintiff's undertaking in damages; if so, there will be no reason on this ground to refuse to grant the plaintiff an interim injunction.

At this stage of the court's consideration of the case (which I will for convenience call the first stage) many applications for interim injunctions can well be decided. But if there is doubt as to the adequacy of either or both of the respective remedies in damages, then the court proceeds to what is usually called the balance of convenience, and for that purpose will consider all the circumstances of the case. I will call this the second stage. Again, I stress that I do not wish to place any gloss upon what Lord Diplock said about this stage. I wish only to record his statement, at p. 408, that

> "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relevant weight to be attached to them. These will vary from case to case."

And his further statement, at p. 409 (after referring to particular factors), that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

I turn to consider the impact upon these guidelines of the public interest, with particular reference to cases in which a public authority is seeking to enforce the law against some person, and either the authority seeks an interim injunction to restrain that person from acting contrary to the law, and that person claims that no such injunction should be granted on the ground that the relevant law is, for some reason, invalid; or that other person seeks an interim injunction to restrain the action of the authority, on the same ground.

I take the first stage. This may be affected in a number of ways. For example, where the Crown is seeking to enforce the law, it may not be thought right to impose upon the Crown the usual undertaking in damages as a condition of the grant of an injunction: see *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295. Again, in this country there is no general right to indemnity by reason of damage suffered through invalid administrative action; in particular, on the law as it now stands, there would be no remedy in damages available to the applicants in the present case for loss suffered by them by reason of the enforcement of the Act of 1988 against them, if the relevant part of the Act should prove to be

A incompatible with European law: see *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716. Conversely, an authority acting in the public interest cannot normally be protected by a remedy in damages because it will itself have suffered none. It follows that, as a general rule, in cases of this kind involving the public interest, the problem cannot be solved at the first stage, and it will be necessary for the court to proceed to the second stage, concerned with the balance B of convenience.

Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that "one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed:" see *Smith v. Inner London Education Authority* [1978] C 1 All E.R. 411, 422, *per* Browne L.J., and see also *Sierbien v. Westminster City Council* (1987) 86 L.G.R. 431. Like Browne L.J., I incline to the opinion that this can be treated as one of the special factors referred to by Lord Diplock in the passage from his speech which I have quoted. In this context, particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the D duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance E to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being from enforcing the law. This was expressed in a number of different ways by members of the Appellate Committee in the *Hoffmann-La Roche* case [1975] A.C. 295. Lord Reid said, at p. 341, that

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> "it is for the person against whom the interim injunction is sought to show special reason why justice requires that the injunction should not be granted or should only be granted on terms."

Lord Morris of Borth-y-Gest, at pp. 352–353, stressed that all considerations appertaining to the justice of the matter become within the purview of the court; but he also stated that, in a case where the G defendant attacks the validity of what appears to be an authentic law, the measure of the strength of this attack must inevitably call for some consideration. Lord Diplock, at p. 367, asserted that prima facie the Crown is entitled as of right to an interim injunction to enforce obedience to the law; and that

> "To displace this right or to fetter it by the imposition of conditions H it is for the defendant to show a strong prima facie case that the statutory instrument is ultra vires."

Lord Cross of Chelsea did not expressly address the point. Lord Wilberforce, in a dissenting speech, stressed, at p. 358, that, in the last

resort, the matter is one for the discretion of the judge; in particular, he rejected a suggestion that the presumption of validity of subordinate legislation required the court to enforce such legislation, by an interlocutory injunction, against the party who was calling the validity of such legislation in question.

I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of a law must—to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law—show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken.

With these principles in mind, I come to the facts of the present case. There can be no question of the present application being decided at the first stage of Lord Diplock's approach, and it is necessary to proceed at once to the second stage.

Your Lordships heard submissions from both parties about the strength of the applicants' challenge to the relevant provisions of section 14 of the Act of 1988. It is plain that the United Kingdom will, before the European Court of Justice, be resisting most strongly arguments by the applicants that any provision in section 14 is incompatible with European law, whether in respect of nationality (despite the recent decision of the President to grant interim relief), or in respect of domicile and residence of beneficial owners, shareholders and directors. It is unnecessary, and perhaps undesirable, for your Lordships now to analyse these arguments. They are set out in detail in the written observations already submitted by the United Kingdom and by the applicants to the European Court of Justice on the substantive reference by the Divisional Court, copies of which have been made available to your Lordships. There are, however, certain reasons which persuaded me to conclude, for present purposes, that, prima facie, the applicants had strong grounds for challenging the validity of the provisions relating to residence and domicile. First, a central element in the argument of the United Kingdom, in seeking to uphold the validity of section 14, is that articles 7, 52 and 221 of the Treaty should not be interpreted as affecting the nationality of vessels, or the grant of flags, in respect of which competence remains in principle with the member states. It has to be said, however, that an argument on these lines does not appear to

have found favour with the President on the Commission's application for interim relief: *Commission of the European Communities v. United Kingdom* (Case 246/89 R) [1989] E.C.R. 3125. Second, although in the *Jaderow* case [1990] 2 Q.B. 193 the European Court accepted that a member state, in authorising a vessel to fish against national quotas, might lay down conditions designed to ensure that it had a real economic link with the state if that link concerned only the relation between that vessel's fishing operations and the populations dependent on fisheries and related industries, yet in the *Agegate* case [1990] 2 Q.B. 151 the court rejected as invalid a condition requiring residence in the member state of 75 per cent. of the vessel's crew. If such a residence qualification is rejected in respect of the crew, as a condition of the grant of a vessel's licence, it may well be difficult to persuade the court to adopt a residence qualification relating to beneficial owners, or to 75 per cent. of shareholders in or directors of a company which beneficially owns a vessel, as a condition of registration of a fishing vessel under the Act of 1988; a fortiori must the same be true of a condition relating to domicile. As to the final outcome on these issues after consideration by the court, your Lordships can of course express no opinion; but these two points alone led me to conclude that the applicants' challenge is, prima facie, a strong one.

It is on that basis that I turn to consider the balance of convenience as a whole. I have already referred to the view formed by Neill L.J., when the matter was before the Divisional Court [1989] 2 C.M.L.R. 353, that serious damage may be caused to the applicants if no interim relief is granted. Your Lordships were furnished with up-to-date evidence in the form of answers to a questionnaire sent to owners of 62 vessels during the recent hearing. None of the answers to the questionnaire was on oath; and it was not in the circumstances possible for the Secretary of State to test the answers, or indeed to check their accuracy. However, no objection was made to this material being placed before your Lordships.

The answers to the questionnaire were not complete. However, from the answers received it was possible to derive the following basic information. All 62 vessels ceased to be on the United Kingdom register after the lapse of the old register on 1 April 1989. Twenty-four of the vessels have not fished since their registration lapsed; of the remainder, 33 have fished but only outside E.E.C. waters, in some cases for very short periods and in most cases after being laid up for a considerable time. Twenty-four vessels have succeeded in obtaining registration under the Act of 1988, but always for special reasons, 14 of them because shares in the owning company had been sold to qualified persons or companies. Thirty owners have tried to sell their vessels, but none of them has received an acceptable offer. Many owners claim to have suffered damages to date of well over £100,000; some fear imminent bankruptcy.

Your Lordships also had the benefit of a fourth affidavit sworn by Mr. Noble of the Ministry of Agriculture, Fisheries and Food. Apart from specific comments on particular vessels in the ownership of the applicants, he placed evidence before your Lordships to the effect that,

as a result of the introduction of the new register, a number of British fishing vessels other than those owned by Spanish interests had been able to take up the opportunities now available to them, taking increased catches, employing extra crew, investing in new vessels to take advantage of the new opportunities, and generating increased activity onshore. He considered that, if the applicants' vessels returned to the British fleet and resumed their previous activities, the owners of these British fishing vessels would suffer serious losses; and he anticipated that the reintroduction of stiff quota restrictions would be required. However, even taking this evidence fully into account, I have, on all the material available to your Lordships, formed the same opinion as that formed by Neill L.J. in the Divisional Court on the material then before him, that there was not sufficient to outweigh the obvious and immediate damage which would continue to be caused if no interim relief were granted to the applicants.

It was for these reasons that, in agreement with the remainder of your Lordships, I concluded that the appeal should be allowed and interim relief granted in the terms of the order made.

LORD JAUNCEY OF TULLICHETTLE. My Lords, I have had the advantage or reading in draft the speech to be delivered by my noble and learned friend Lord Goff of Chieveley. I agree with the conclusion at which he has arrived and I gratefully adopt his detailed account of the circumstances giving rise to the present appeal. It is only because of the importance and novelty of the principal question to be considered that I venture to add a few observations thereanent.

The European Court of Justice has ruled, ante, p. 644H, that:

> ". . . Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule."

This House is accordingly now faced with the wholly novel situation of determining whether in the circumstances of this appeal interim relief against the application of primary legislation should be granted to the applicants, pending the decision of the European Court of Justice on the reference by the Divisional Court of 10 March 1989. In reaching a conclusion the following matters have to be addressed, namely: (1) the threshold which must be crossed by the applicants before this House will consider intervening, (2) whether they have crossed that threshold, and (3) if they have, whether the balance of convenience favours the granting of interim relief.

(1) *The threshold*

When this appeal was last before your Lordships' House [1990] 2 A.C. 85 my noble and learned friend, Lord Bridge of Harwich, referred to the familiar situation in which a plaintiff seeks an interim injunction to protect a right when the material facts are in dispute and continued, at p. 139:

A "In this situation the court has a discretion to grant or withhold interim relief which it exercises in accordance with the principles laid down by your Lordships' House in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396. In deciding on a balance of convenience whether or not to make an interim injunction the court is essentially engaged in an exercise of holding the ring."

B *American Cyanamid* concerned a claim for alleged infringement of patent and an application for interim injunction was made upon contested facts. Lord Diplock referred, at p. 407, to:

"the supposed rule that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if the case went to trial upon no other evidence than is before the court at the hearing of the application the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injuction sought . . ."

and continued:

"Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as 'a probability,' 'a prima facie case,' or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

As I understand it Lord Diplock in that passage was saying that the court must be satisfied that there is a serious question to be tried before it considers the balance of convenience. Indeed this must be so since it would be quite wrong that a plaintiff should obtain interim relief on the basis of a claim which was groundless. I agree that it is not the function of the court to try to resolve conflicts of evidence at an interlocutory stage but I would demur to any suggestion that in no circumstances would it be appropriate to decide questions of law. If the only question at issue between the parties is one of law it may be possible in many cases to decide this at the stage of a contested application for an interim injunction. For example, where an employer seeks to enforce a restrictive covenant in a former employee's contract of employment and the only defence is that the covenant by reason of its wide terms is unenforceable, it would be wholly illogical to grant to the employer an interim injunction on the basis that there was a serious question to be tried when the question could at the same time be resolved as matter of law in favour of the employee.

However, while the test of a serious question to be tried is appropriate to proceedings between private parties where no presumption

favours the position of one party as against the other it does not follow that the same considerations apply when primary legislation and the public interest are involved. Indeed, my noble and learned friend, Lord Bridge of Harwich (*Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85, 140), remarked upon the fundamental distinction between the familiar situation and that which arises in this appeal. In *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, the Secretary of State having sought by interim injuction to enforce a statutory instrument approved by both Houses of Parliament the defenders maintained that the instrument was ultra vires. Lord Reid said, at p. 341, that:

> "it is for the person against whom the interim injunction is sought to show special reason why justice requires that the injunction should not be granted or should only be granted on terms"

and Lord Morris of Borth-y-Gest, at p. 353, pointed out that the measure of the strength of the attack upon the statutory instrument must inevitably call for some consideration. Lord Diplock said, at p. 366:

> "All that can usefully be said is that the presumption that subordinate legislation is intra vires prevails in the absence of rebuttal, and that it cannot be rebutted except by a party to legal proceedings in a court of competent jurisdiction who has locus standi to challenge the validity of the subordinate legislation in question."

He said, at p. 367:

> "So in this type of law enforcement action if the only defence is an attack on the validity of the statutory instrument sought to be enforced the ordinary position of the parties as respects the grant of interim injunctions is reversed. The duty of the Crown to see that the law declared by the statutory instrument is obeyed is not suspended by the commencement of proceedings in which the validity of the instrument is challenged. Prima facie the Crown is entitled as of right to an interim injunction to enforce obedience to it. To displace this right or to fetter it by the imposition of conditions it is for the defendant to show a strong prima facie case that the statutory instrument is ultra vires."

These observations, in my view, apply not only where a defendant is seeking to resist an attempt by the Crown to enforce secondary legislation but also where a plaintiff is seeking to restrict the Crown in its operation of such legislation. They must be equally appropriate to a challenge to primary legislation as they are to a challenge to secondary legislation. Indeed, when this appeal was last before this House Lord Bridge said, at p. 142:

> "In this situation the difficulty which confronts the applicants is that the presumption that an Act of Parliament is compatible with Community law unless and until declared to be incompatible must be at least as strong as the presumption that delegated legislation is valid unless and until declared invalid."

Given this presumption it follows from the above observations of Lord Diplock that it is for the Crown to enforce the provisions of the Act of 1988 and that anyone, whether a plaintiff or defendant, who seeks to challenge the validity thereof must at least show a strong prima facie case of incompatibility with Community law. It is the presumption in favour of the legislation being challenged which in my view makes the *American Cyanamid* test of a serious question to be tried inappropriate in a case such as the present. In expressing this opinion I must emphasise that I am in no way criticising the appropriateness of the *American Cyanamid* test for cases where primary or secondary legislation is not being challenged nor am I suggesting that Lord Diplock's approach to the balance of convenience is not appropriate in this case.

My Lords, I have considered anxiously whether other factors such as relative hardship or injustice should play any part in determining the appropriate threshold which an applicant for relief in circumstances such as the present should cross. Given the wide discretion conferred upon the courts by section 37 of the Supreme Court Act 1981 I would not wish to lay down any rules which might unduly inhibit that discretion in unforeseen circumstances in the future. Suffice it to say that as at present advised it would only be in the most exceptional circumstances that I can foresee the threshold being lowered by factors not directly related to the invalidity of the legislation under challenge. In the normal case other factors would be considered in relation to the balance of convenience. If an applicant seeking an injunction against primary or secondary legislation cannot show a strong prima facie ground of challenge it will in the absence of quite exceptional circumstances avail him nought that a refusal of an injunction would result in greater injustice to him should he succeed at trial than would result to the other party if the injunction was granted and he failed at trial.

I therefore conclude that the applicants will only cross the threshold if they demonstrate that there is a strong prima facie case that section 14 of the Act of 1988 is incompatible with Community law, which failing that exceptional circumstances exist which would justify lowering the threshold.

(2) *Have the applicants crossed the threshold?*

Section 14(1) provides that a fishing vessel shall only be eligible to be registered as a British fishing vessel if inter alia "the vessel is British-owned." Section 14(2) provides that a fishing vessel is British-owned if the legal title is vested wholly in one or more qualified persons or companies and section 14(7) provides that a qualified company is one which is incorporated in the United Kingdom with 75 per cent. of the shares held by and 75 per cent. of its directors being qualified persons. Qualified person is defined in section 14(7) as "a person who is a British citizen resident and domiciled in the United Kingdom." It is to this latter definition that Mr. Vaughan confined his attack on the ground that such a restriction in ownership was incompatible with Community law.

Since the appeal was last before this House in 1989 certain important events have taken place in the European Court. On 4 August 1989

(*Commission of the European Communities v. United Kingdom* (Case 246/89 R) [1989] E.C.R. 3125), the Commission sought a declaration that the nationality requirements of section 14 of the Act of 1988 constituted a failure by the United Kingdom to fulfil certain of its Treaty obligations. On 10 October 1989 the president of the court made the following order:

> "Pending delivery of the judgment in the main proceedings, the United Kingdom shall suspend the application of the nationality requirements laid down in section 14(1)(*a*) and (*c*) of the Merchant Shipping Act 1988, read in conjunction with paragraphs (2) and (7) of that section, as regards the nationals of other member states and in respect of fishing vessels which, until 31 March 1989, were pursuing a fishing activity under the British flag and under a British fishing licence . . . "

Effect was given to this order by the Merchant Shipping Act 1988 (Amendment) Order 1989 which, in relation to the fishing vessels in question, amended section 14 by substituting "Community-owned" for "British-owned" in subsection (1) and by amending the definition of the "qualified person" to read "a person who is a British citizen or a national of a member state other than the United Kingdom and in either case resident and domiciled in the United Kingdom."

It will be noted that the Commission did not seek to challenge the residence and domicile qualification which is now challenged by Mr. Vaughan. On 14 December 1989 the European Court similarly constituted gave judgment in two cases which may for convenience be called *Agegate* [1990] 2 Q.B. 151 and *Jaderow* [1990] 2 Q.B. 193. Both cases concerned the grant to British-registered fishing vessels with strong Spanish connections of fishing licences which contained crewing conditions to the effect that: (1) at least 75 per cent. of the crew must be British citizens or E.E.C. nationals (excluding until 1 January 1993 Spanish nationals), and (2) the skipper and all the crew must be making contributions to United Kingdom national insurance. In the course of the *Agegate* judgment the following observations on the quota system were made [1990] 2 Q.B. 151, 188:

> "24. It follows from the foregoing that the aim of the quotas is to assure to each member state a share of the Community's total allowable catch, determined essentially on the basis of the catches from which traditional fishing activities, the local populations dependent on fisheries and related industries of the member state benefited before the quota system was established. 25. In that context a residence requirement such as the one in point in this case is irrelevant to the aim of the quota system and cannot therefore be justified by that aim."

And the court ruled, inter alia, at p. 192:

> "2. Community law precludes a member state from requiring, as a condition for authorising one of its vessels to fish against its quotas, that 75 per cent. of the crew of the vessel in question must reside ashore in that member state. 3. Save in those cases where Council

Regulation (E.E.C.) No. 1408/71 otherwise provides, Community law does not preclude a member state from requiring, as a condition for authorising one of its vessels to fish against its quotas, that the skipper and all the crew of the vessel must be making contributions to the social security scheme of that member state."

In the *Jaderow* judgment [1990] 2 Q.B. 193 the court recognised that the aim of national quotas derived from the common fisheries policy might justify conditions designed to ensure that there was a real economic link between the vessel and the member state in question if the purpose of such conditions was that the populations dependent on fisheries and related industries should benefit from them. The court ruled inter alia, at p. 226, that Community law as it now stands:

> "(1) does not preclude a member state, in authorising one of its vessels to fish against national quotas, from laying down conditions designed to ensure that the vessel has a real economic link with that state if that link concerns only the relations between that vessel's fishing operations and the populations dependent on fisheries and related industries; (2) does not preclude a member state, in authorising one of its vessels to fish against national quotas, from laying down the condition, in order to ensure that there is a real economic link as defined above, that the vessel is to operate from national ports, if that condition does not involve an obligation for the vessel to depart from a national port on all its fishing trips; . . ."

It is to my mind implicit in these two decisions that the court did not consider that residence and domicile of a specified percentage of the crew was justified as a condition designed to ensure the existence of a real economic link between the vessel and the member state. Had the court so considered *Agegate* [1990] 2 Q.B. 151 must have been decided differently. If residence of the crew is not relevant to ensure the existent of a real economic link between vessel and member state what is the position in relation to the residence of shareholders and directors of an owning company? The role of this House is not to give an answer to that question but rather to assess the prospects of the European Court giving an answer which is favourable to the applicants. Directors and shareholders are further removed from any link between a vessel and a member state than are members of the crew and the European Court having decided that residence of the latter is not relevant to ensure the existence of a real economic link there must at least be a strong probability that the court will take a similar view in relation to the former. Upon that assumption it would appear that the applicants can show a strong prima facie ground of challenge to the relevant statutory provision. However, there remains for consideration the argument of the Crown that Community law does not affect the sovereign right of a member state to lay down the conditions for the grant of its flag to ships. Customary international law, as expressed in article 5(1) of the Geneva Convention on the High Seas, requires that there should be a genuine link between a vessel and the state of her flag. Article 94 of the 1982 Convention on the Law of the Sea sets out the important legal and international obligations incurred by a state in

relation to a vessel to whom the flag of the state has been granted. In the absence of any express provision it should not be presumed that the Treaty interferes with the exercise by a member state of its sovereign powers. I was initially attracted by these submissions and in some doubt as to whether they should not be given effect to. However on further consideration of the President's ruling of 10 October 1989 I have come to the conclusion that the applicants can show that they are very likely to be rejected by the European Court. In the context of legislative requirements introduced by member states to obtain the objective of the Community system of fishing quotas the president said:

> "29. However there is nothing which would prima facie warrant the conclusion that such requirements may derogate from the prohibition of discrimination on grounds of nationality contained in articles 52 and 221 of the E.E.C. Treaty regarding, respectively, the right of establishment and the right to participate in the capital of companies or firms within the meaning of article 58. 30. The rights deriving from the above-mentioned provisions of the Treaty include not only the rights of establishment and of participation in the capital of companies or firms but also the right to pursue an economic activity, as the case may be through a company, under the conditions laid down by the legislation of the country of establishment for its own nationals. 31. These rights prima facie also include the right to incorporate and manage a company whose object is to operate a fishing vessel registered in the state of establishment under the same conditions as a company controlled by nationals of that state. 32. As regards the United Kingdom's first submission based on its obligations under international law, it is sufficient to note, at this stage, that in this respect nothing has been put forward which at first sight could necessitate any derogation from the above-mentioned rights under Community law in order to ensure the effective exercise of British jurisdiction and control over the vessels in question. 33. It must therefore be held that, at the stage of these proceedings for the grant of interim relief, the application in the main proceedings does not appear to be without foundation and that the requirement of a prima facie case is thus satisfied."

Given the foregoing observations of the president it would appear that the applicants have a strong chance of successfully arguing before the European Court that international law does not justify derogation from the prohibition of discrimination on grounds of nationality contained in articles 52 and 221 of the Treaty.

In all these circumstances I consider that the applicants have crossed the threshold in relation to section 14 of the Act of 1988. It is therefore unnecessary to consider whether such exceptional circumstances exist as will justify lowering that threshold.

(3) *Balance of convenience*

In *Films Rover International Ltd. v. Cannon Film Sales Ltd.* [1987] 1 W.L.R. 670 Hoffmann J. in considering an application for an

interlocutory mandatory injunction implicitly acknowledged that there was a serious question to be tried and said, at p. 680:

> "The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

I find this approach of assistance in the present case.

If the applicants are successful in the end of the day but are afforded no interim relief they will, standing the law as laid down in *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716, suffer very severe and irrecoverable damage. If they are ultimately unsuccessful but are afforded interim relief the loss suffered by the British fishing industry as a whole and by individual members thereof during the period of interim relief will be relatively minor. Beyond this I cannot usefully add anything to what has already been said on this matter by my noble and learned friend Lord Goff of Chieveley. It follows that, the applicants having crossed the threshold, the balance of convenience favours the granting to them of interim relief.

Order accordingly.
Applicants' costs in Court of Appeal, European Court and House of Lords to be costs in cause.
Cause remitted to Queen's Bench Division.

Solicitors: Thomas Cooper & Stibbard; Thomas Cooper & Stibbard; Treasury Solicitor.

M. G.