

Case 246/89 R

Commission of the European Communities
v
United Kingdom of Great Britain and Northern Ireland

(Fisheries — Registration of fishing vessels —
Nationality requirement)

Order of the President of the Court, 10 October 1989 3125

Summary of the Order

Application for interim measures — Interim measures — Conditions for granting — Serious and irreparable damage — Appropriateness of the measure sought — Balancing of all the interests in question

(EEC Treaty, Art. 186; Rules of Procedure, Art. 83(2))

ORDER OF THE PRESIDENT OF THE COURT
10 October 1989*

In Case 246/89 R

Commission of the European Communities, represented by its Legal Adviser, Robert Fischer, and Mr P. Oliver, a member of its Legal Department, acting as

* Language of the case: English.

Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by Sir Nicholas Lyell, QC, Solicitor-General, and Mr. T. J. G. Pratt, acting as Agents, with an address for service in Luxembourg at the British Embassy, 14, boulevard Roosevelt,

defendant,

supported by

Ireland, represented by Mr Louis J. Dockery, Chief State Solicitor, acting as Agent, assisted by James O'Reilly, Senior Counsel of the Bar of Ireland, with an address for service in Luxembourg at the Irish Embassy, 28, route d'Arlon,

intervener,

APPLICATION for an order requiring the suspension of the application of the nationality requirements enshrined in sections 13 and 14 of the Merchant Shipping Act 1988,

THE PRESIDENT OF THE COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

1 By application lodged at the Court Registry on 4 August 1989, the Commission of
the European Communities brought an action pursuant to Article 169 of the EEC
Treaty for a declaration that, by imposing the nationality requirements enshrined
in sections 13 and 14 of the Merchant Shipping Act 1988, the United Kingdom
had failed to fulfil its obligations under Articles 7, 52 and 221 of the EEC Treaty.

2 Section 13(1) of the Merchant Shipping Act 1988 provides for the establishment of
a new register of British fishing vessels in which fishing vessels fulfilling the
conditions laid down in section 14 of the Act may be registered. Section 13(2) in
substance excludes the registration of fishing vessels in any other British register.
However, section 13(3) extends, for a transitional period, the validity of existing
registrations pending registration in the new register.

3 The Merchant Shipping Act 1988 entered into force on 1 December 1988 and the
transitional period referred to in section 13(3) expired on 31 March 1989.

4 Section 14(1) of the Merchant Shipping Act 1988 provides that, except where the
Secretary of State for Transport decides otherwise, a fishing vessel is to be 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.’

According to paragraph (2) of the same section, a fishing vessel is 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% of the property therein by one or more qualified persons. According to section 14(7) 'qualified person' means a person who is a British citizen resident and domiciled 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% of its shares being owned by one or more qualified persons or companies and at least 75% of its directors being qualified persons.

- 5 By a separate document, also lodged at the Court Registry on 4 August 1989, the Commission of the European Communities made an application pursuant to Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure by which it sought, as it explained at the hearing, an order requiring the United Kingdom to suspend the application of the nationality requirements enshrined 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. The vessels in question are thus those which were prevented from continuing that activity solely by reason of the aforesaid nationality requirements.
- 6 By order of 12 September 1989 Ireland was granted leave to intervene in these interlocutory proceedings in support of the United Kingdom.
- 7 The defendant submitted written observations on 25 August 1989 and the parties presented oral argument at the hearing on 15 September 1989.
- 8 It is appropriate to set out *in limine* the factual and legal context of the dispute.
- 9 On 1 February 1976, the Community, then composed of nine Member States, established a common regime for sea fishing. Article 2(1) of Council Regulation No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal 1976, L 20, p. 19) requires the Member States to

ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters coming under their sovereignty or jurisdiction for all fishing vessels flying the flag of a Member State and registered in Community territory.

- 10 With effect from 1 January 1977 the Member States, by concerted action, extended the exclusive fishing zones under their jurisdiction to 200 nautical miles from their coasts bordering in particular the North Atlantic. From what had become Community waters there were excluded *inter alia* fishing vessels flying the flag of Spain, a number of which had until then fished there, in particular to the west of the British Isles and off the French coasts.
- 11 After a transitional system the Community concluded on 15 April 1980 an agreement on fisheries with the Government of Spain (Official Journal 1980, L 322, p. 3), laying down the conditions for fishing by vessels of each party in the zones coming within the jurisdiction of the other party. That agreement provided for the annual determination of the volume of catches allocated to the vessels of each party in the fishing zones of the other party and the establishment of a system of licences for the vessels authorized to make these catches.
- 12 It is common ground that, following that agreement, a large number of fishing vessels flying the flag of Spain were re-registered in the United Kingdom where their owners formed companies to which the ownership of the vessels was transferred. The Merchant Shipping Act 1894, which was then in force, merely required, for registration in the British register, that the vessel be owned by a British subject or by a company incorporated in the United Kingdom and having its principal place of business there. Re-registration enabled these vessels to fish in Community waters under the British flag and under a British fishing licence but to land their catches in Spain.
- 13 The Member States established a system of fishing quotas with effect from 27 January 1983. Article 3 of Council Regulation No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (Official Journal 1983, L 24, p. 1) provides for the periodic fixing of the total allowable catches for certain species or certain groups of species and Article 4 of the regulation provides for the distribution between the Member States of the volume of catches available to the Community. Under Article 10 of Council Regu-

lation No 2057/82 of 29 June 1982 establishing certain control measures for fishing activities by vessels of the Member States (Official Journal 1982, L 220, p. 1) all catches subject to quota made by fishing vessels flying the flag of a Member State or registered in a Member State are to be charged against the quota applicable to that State, irrespective of the place of landing.

- 14 By the British Fishing Boats Act 1983 and the British Fishing Boats Order 1983 the British authorities introduced on 30 March 1983 new rules on fishing vessels. These rules, which do not affect the validity of existing fishing licences, prohibit fishing in waters coming under the jurisdiction of the United Kingdom and the landing of fish in the United Kingdom by British vessels which do not have crews at least 75% of whose members are British citizens or nationals of the Member States of the Community.
- 15 On 1 January 1986 Spain became a member of the Community. As regards fishing, Articles 156 to 164 of the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties (Official Journal L 302, 15.11.1985) establish, for the period up to 31 December 2002, a transitional system which limits the number of fishing vessels flying the flag of Spain which may pursue their activities in the waters coming within the jurisdiction of the Member States of the former Community to 300 vessels whose names appear on a list and only 150 of which are authorized to pursue their activity simultaneously.
- 16 It is also common ground that, following the accession of Spain, a number of British fishing vessels were acquired together with their fishing licences by Spanish interests through companies formed for that purpose in the United Kingdom. Like the Spanish vessels previously re-registered in the United Kingdom, these vessels, operated by Spanish crews, were able, under the existing legislation, to fish in the waters within the jurisdiction of the Member States of the Community of Ten, with the exception of British waters, and to land their catches in Spain, the catches thus landed being charged against the quotas allocated to the United Kingdom.
- 17 However, with effect from 1 January 1986, the United Kingdom authorities undertook a systematic renewal of British fishing licences. The new licences are made subject to the following requirements:

- (i) the vessel must operate from the British Isles and is deemed to have been so operating if for a period of six months at least 50% of its catches have been landed and sold in the British Isles or if it calls at a port there on at least four occasions at intervals of at least 15 days;
- (ii) at least 75% of the vessel's crew must be British citizens or nationals of the Member States of the Community resident 'on shore' in the United Kingdom, other than, until 1 January 1993, *inter alia* Spanish nationals to whom certain provisions of Community law relating to the freedom of movement for workers are to apply, by virtue of Articles 55 to 59 of the Act of Accession, only as from that date;
- (iii) the skipper and the crew must make contributions to the British social security scheme.

18 The legality of these requirements, particularly from the point of view of Community law, has been challenged before the British courts and is the subject of two references to the Court for a preliminary ruling (Case 3/87 *Agegate* and Case 216/87 *Jaderow*). The proceedings relating to these references are still pending before the Court. The same requirements are also the subject of an action brought by the Commission for failure to fulfil obligations under the Treaty (Case 279/89 *Commission v United Kingdom*).

19 Lastly, it should be pointed out that the legality of the requirements laid down in section 14 of the Merchant Shipping Act 1988 has also been challenged before the British courts and, as regards the compatibility of such requirements with Community law, is the subject of a reference to the Court for a preliminary ruling (Case 221/89 *Factortame*).

20 Under Article 186 of the EEC Treaty the Court may in any cases before it prescribe any necessary interim measures.

21 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.

- 22 It must be considered whether these conditions are satisfied in this case.
- 23 As regards first of all the condition of existence of a prima-facie case, the Commission points out that it is contesting solely the nationality requirements laid down by section 14 of the Merchant Shipping Act 1988. These requirements prohibit nationals of the other Member States from acquiring, through a company, a British fishing vessel and from managing a company operating such a vessel under the same conditions as British nationals. This constitutes direct discrimination, in flagrant breach of the prohibition of discrimination on grounds of nationality, which cannot be justified either by the Community rules on fishing quotas or by the United Kingdom's obligations under international law.
- 24 For its part, the United Kingdom considers that the national provisions contested by the Commission do not infringe Community law. Any Member State is at liberty to lay down the conditions for registration of ships and for flying its flag. International law requires the United Kingdom to lay down these conditions in such a way that the ship has a genuine link with the United Kingdom, enabling that country to exercise effectively its jurisdiction and control over the ship. The conditions contained in the Merchant Shipping Act 1988 correspond to those imposed by other Member States for flying their flag.
- 25 The United Kingdom further considers that the nationality requirements introduced by the 1988 Act 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 utilization of the quotas allocated to them and thus to lay down the conditions which the vessels authorized 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 to 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 EEC 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 needs 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 EEC 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 abovementioned 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 abovementioned 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.
- 34 As regards, next, the condition relating to urgency, it should be borne in mind that the urgency of an application for interim measures must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage.
- 35 The Commission makes the observation that the establishment of the new register of British fishing vessels has had the effect of forcing the entire 'Anglo-Spanish' fleet to remain idle. According to its information the registration in that register of a number of those vessels is precluded solely by reason of the nationality requirements at issue, since the vessels in question could satisfy the other requirements under section 14 of the Merchant Shipping Act 1988, in particular that relating to management and control from the United Kingdom. The owners of the vessels in question are suffering heavy losses as a result of the vessels' remaining idle and will in the short term be forced to sell them under very adverse conditions. Under British civil law these losses cannot later be recovered by means of actions brought against the British authorities.
- 36 The United Kingdom contends that the interim measures applied for would in practice be ineffectual. Leaving aside the nationality requirements, the United Kingdom denies that the vessels forced to remain idle would be able to satisfy the requirements for registration, in particular those relating to residence in the United Kingdom and the management of the vessel from the United Kingdom. The suspension of the application of the nationality requirements, requested by the Commission, could not, therefore, prevent the damage alleged and there is

accordingly no urgency. The United Kingdom stresses moreover that the interest which the Commission may have in obtaining these interim measures must be weighed against the United Kingdom's interest in achieving a lasting settlement of the problems caused by the 'Anglo-Spanish' vessels for the British fishing industry. The measures adopted to that end by the British authorities in 1983 and 1986 remained ineffective and only the introduction of requirements that are clear and easy to administer makes it possible to resolve these problems.

37 It must be held in the first place that for fishing vessels which until 31 March 1989 were flying the British flag and fishing under a British fishing licence the loss of the flag and the cessation of their activities entail serious damage. There is no ground for believing that, pending delivery of the judgment in the main proceedings, these vessels can be operated in the pursuit of alternative fishing activities. The aforesaid damage must also, should the application in the main proceedings be granted, be regarded as irreparable.

38 It is true that, for there to be urgency, it is necessary that the interim measures requested should be of a nature to prevent the alleged damage. At the present stage of the proceedings the possibility cannot however be excluded that a number of the vessels in question may, as the Commission maintains, satisfy the registration requirements if the application of the nationality requirement is suspended.

39 Finally, as regards the balance of interests, it is not established that the interim measures applied for may jeopardize 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.

- 41 It is true that the nationality requirements would be easier to administer than the requirements relating to the actual operation of a vessel. A Member State may not however plead administrative difficulties in order not to comply with the obligations laid on it by Community law.
- 42 It follows that the condition relating to urgency is also satisfied. The interim measures applied for must therefore be ordered.

On those grounds,

THE PRESIDENT

hereby orders:

- (1) 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.
- (2) The costs, including those relating to the intervention, are reserved.

Luxembourg, 10 October 1989.

J.-G. Giraud
Registrar

O. Due
President