Freedom of establishment and threats of industrial action by unions of maritime workers

Viking Line ABP v International Transport Workers' Federation and Finnish Seamen's Union
[2005] EWHC 1222 (Comm) English Commercial Court

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FREEDOM OF ESTABLISHMENT AND THREATS OF INDUSTRIAL ACTION BY UNIONS OF MARITIME WORKERS

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The facts

Readers are likely to know that Viking Line ABP, one of the larger passenger shipping companies in the world, is a company incorporated and registered in Finland. The present case involves one of Viking's less profitable lines – the Helsinki-Talinn route. The vessel in question is the *Rosella* which was originally registered under the Finnish flag. Viking had applied to reflag the *Rosella* under the Estonian flag as its principal competitors on the route man their vessels with Estonian crews, which are significantly cheaper than Finnish crews. The company's position was that the reflagging would entitle them to crew the ship with Estonian seamen which would result in considerable savings.

The trade unions (the Finnish Seamen's Union and the International Transport Workers' Federation) were resolved to take industrial action in protest. Viking thus applied for various declarations and injunctions in anticipation of strike action by the FSU, and action by the ITF requiring ITF affiliates in other jurisdictions, which Viking vessels visit, to participate in concerted boycott and other industrial action against the *Rosella* and other Viking vessels. ITF argued that the English court lacked substantive jurisdiction to make such orders.

Viking contended that any such action by the FSU and the ITF would be contrary:

(a) to Article 43 of the Treaty establishing the European Community (EC), (the principle of the freedom of establishment);

(b) to Article 39 EC, (the principle of the free movement of workers); or

(c) Article 1 of Council Regulation 4055/86/EEC, (applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.

The decision

The first issue the court had to address was whether, despite the fact that under Article 2 of the Brussels Regulation 44/2001 it had jurisdiction because the defendant, ITF, was domiciled in the UK, it should, for reasons of judicial comity, not permit the application to proceed because it would

involve, inter alia, a judgment as to what Finnish law was and an assessment of whether Finnish law was compatible with EU law. However, the court stressed that following the ECJ's ruling in Case C–281/02 *Andrew Owusu v N B Jackson trading as 'Villa Holidays Bal-Inn Villas' & Others*,[1] the court cannot take into account the doctrine of *forum non conveniens* to decline jurisdiction even though the facts might point to another jurisdiction as having a closer connection with the dispute. As long as under the Regulation, the court of one Member State is seised because the defendant is domiciled in that Member State, all other Member States must decline jurisdiction and the Member State concerned should not refuse jurisdiction (unless permitted by the Regulation to do so – such as where the proceedings were in breach of an exclusive jurisdiction clause, or that proceedings have in fact been commenced earlier in another Member State in accordance with the Regulation).

It was argued that the English court should decline jurisdiction because any declaration or injunction given by the English court would not be enforced in Finland. The court rejected that argument holding that under the EU system of mutual recognition and enforcement of judgments, there was no good or conceivable reason that a Finnish court would not recognise and enforce a judgment from an English court.

Once jurisdiction was established, Gloster J proceeded to rule that the measures in question were in danger of breaching Viking Line's rights under EU law and the injunctions sought should thus be granted.

The court was also asked to make a reference to the ECJ for a preliminary ruling. Gloster J declined, holding that the case was a very fact-dependent case and the area of law in question was one where there is much developed jurisprudence already in existence. The court was also concerned that a reference would result in considerable delay which would be injurious to Viking Line's interests. There was no need thus to make a reference to the ECJ.

Comment

Jurisdiction

As to the question of jurisdiction and the argument that a Finnish court would not recognise an injunction granted by the English court, the court held that under Regulation 44/2001, a Member State is duty bound to recognise and enforce judgments from another Member State unless the judgment was contrary to the public policy of the Member State in which recognition is sought. The court added thus that a declaration by one Member State that the proposed industrial action was illegal under EU law would be recognised by the court of another Member State and that there was no conceivable good public policy ground on which a Finnish court would decline to recognise and enforce it. As Gloster J said:

> Refusal and enforcement of such a judgment could therefore not be opposed in Finland on the ground that the English court had misapplied Finnish or Community law in reaching its decision.[2]

This is an important reiteration or restatement of the principle in *Owusu* (and also Case C–159/02 *Turner v Grovit*[3]) that jurisdiction established under the Brussels Regulation should not be given up on the basis of judicially discretionary grounds, such as comity, bad faith etc. In *Turner*, co-operation between Member States is presumed. On that basis, an argument that a Finnish court would reject an English judgment could not realistically be entertained as being valid by an English court because if the Finnish court did act contrary to the principle of mutual recognition and enforcement of judgments, that was a matter for the EU Commission to take up with the Finnish authorities. It was not for the English court to anticipate the non-recognition of its judgment by a fellow Member State tribunal where its own jurisdiction has been properly established under the Brussels regime.

[1] [2005] 2 WLR 942. See analysis (2005) 11 JIML 182.
[2] See para 80 of the judgment.
[3] 27 April 2004, ECJ.

Freedom of establishment

Article 43, EC provides:

> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

It is obvious that Viking possessed the right to establish itself in any Member State by reflagging, free from any impediment which could not be justified under the Treaty exceptions to Article 43. However it was argued by ITF that they had no control over the shipping register in Estonia and as such, could not be said to prevent the reflagging of the *Rosella*. The FSU's contention was that they were only taking industrial action to protect employees' rights, not against the reflagging of the *Rosella*. The judge rejected these arguments, quite rightly, on the basis that the ITF had defined their industrial action measures too narrowly. It was obvious the Viking Line would be very seriously affected by the unions' threatened actions if it proceeded with the reflagging. Additionally, from documentary evidence, it was clear that the ITF was wholly committed to fighting the reflagging. As far as EU law is concerned, it is clear that any measure which is liable to hamper or to render less attractive the exercise by a national of a Member State of the freedom of establishment, is an obstacle to that fundamental freedom guaranteed by the Treaty.[4] Any measure which places an additional financial burden on a person so as to make the exercise of a free movement right more difficult constitutes a restriction on that free movement right.[5]

It should also be noted that as far back as Case C–221/89 *Factortame*,[6] it has been the law that where a vessel is used as 'an instrument for pursuing an economic activity which involves a fixed establishment in the Member State concerned, the registration of that vessel cannot be dissociated from the exercise of the freedom of establishment'.[7] Thus, in the present case, it could not be argued that there was no threat to Viking Line's freedom of establishment because industrial action was directed not at the general activities of the company, only one specific vessel. Consequently, it could also not be suggested that the company's right to establish in Estonia as a subsidiary or other corporate structures was not impeded.

It is conventional law that the freedom of establishment right is one owed by a Member State to the enterprise or undertaking. The question here was, however, whether that was a right owed to Viking by ITF and FSU, which are clearly not emanations of the state. This is perhaps the more interesting question – and one which, perhaps, the court should have made a reference to the ECJ. Be that as it may, it was held that there was horizontal direct effect in Article 43. That means a private entity can claim those rights against another private entity. The court accepted Viking's argument that the ECJ establishes that the free movement rules apply not only to the action of public authorities but also to 'rules of any other nature aimed at regulating gainful employment in a collective manner'.[8] Indeed, in

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[4] Case C–55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procurati di Milano* [1995] ECR I–4165 para 37; Case 249/81 *Commission v Ireland* [1982] ECR 4005 paras 1–3, 21–28.

[5] See, in particular, Case C–272/94 *Michel Guiot* [1996] ECR I–1905 and Case C–435/00 *Geha Naftiliaki EPE & Others v NPDD Limeniko Tamio Dodekanisou* (14 November 2002) OJ C323/17.

[6] [1991] ECR I–3905.

[7] ibid paras 19–23.

[8] Case C–415/93 *Union Royale Belge des Société de Football Association ASBL & Others v Jean-Marc Bosman & Others* [1995] ECR I–4921 as applied in Case C–309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR II–2823.

Wouters,[9] the ECJ, in ruling that Article 43 could extend to professional rules imposed by the Netherlands Bar Council to lawyers, despite the fact that those rules are not public in nature, held that those rules were obviously designed to regulate, collectively, self-employment and the provision of services. Article 43 should not be defeated simply by the contention that associations or organisations which imposed restrictive and/or discriminatory measures are not governed by public law. Gloster J was persuaded by the argument that the ITF's measures, applied by the ITF and invoked by the FSU, constituted a set of 'rules' enforced by sanctions. The court also gave some emphasis to the fact that the FSU actually performed a quasi-public function in regulating employment terms and conditions in accordance with Finnish legislation.

This approach seems consistent with the wider legislative aim of Article 43 to enable corporate entities established in one Member State to establish themselves in another Member State without being hindered by non-governmental measures which have a significant and considerable influence over the industrial sector or profession in question. ECJ case law has extended the proscription in Article 43 to sporting associations and professional bodies and there seems to be no good reason to exclude trade unions from the remit of Article 43, especially in the maritime sector where trade unions wield so much power on the employment of workers which is central to the right of establishment for maritime undertakings.

It was also contended by Viking that, as Article 39 (on free movement of workers) has horizontal direct effect,[10] and the aims of Article 39 are similar to those of Article 43, there was no justification for treating Article 43 as not having same horizontal effect. Gloster J accepted that argument. That said, it might be submitted that although the two articles promoted and pursued the same single market objectives, those objectives are expressed in a general way. Indeed, most of the free movement provisions in the Treaty promoted the same convergence objectives of the single market. Nevertheless, it must be said that this was a supplemental argument to the central thesis that trade unions, by and large, have immense powers to control the labour market, thereby affecting the freedom of establishment and as such, should be subject to free movement provisions of the Treaty. Strong non-governmental bodies such as trade unions, sporting associations, professional bodies and trade associations, should not be allowed to claim the free movement rights without being subject the duties implicit in those rules.

Finally, as regards the issue as to whether the measures taken by the unions were discriminatory, the court was convinced from the evidence that they were intended to protect Finnish jobs. Such protective measures were intended to prevent the ship from being reflagged to take on Estonian crew. They were therefore discriminatory. It might be noted that had the measures been to protect Finnish jobs on Finnish vessels and to pressure foreign vessels to improve the terms and conditions of their foreign crew, they would not have been discriminatory. This issue of discrimination may make it difficult for trade unions acting in their members' interests not also to be found to be acting in a discriminatory manner. The crucial lesson for trade unions is that a measure taken to protect jobs in one country should not impede the right of the company to relocate to another Member State.

[9] ibid.

[10] Meaning that the right of free movement of workers was enforceable by a private individual against another private individual (C–281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I–4139).