

JUDGMENT OF THE COURT
25 July 1991

In Case C-221/89,

REFERENCE to the Court under [Article 267 TFEU] by the High Court of Justice of England and Wales, Queen's Bench Division, for a preliminary ruling in the proceedings pending before that court between

The Queen

and

The Secretary of State for Transport, ex parte Factortame Limited and Others,

on the interpretation of the provisions of [Union] law governing, in particular, the right of establishment and of the principles of proportionality and non-discrimination on grounds of nationality, with a view to determining the compatibility with [Union] law of national legislation laying down the conditions for the registration of fishing vessels,

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. Grevisse and M. Zuleeg, Judges,

Advocate General: J. Mischo,
Registrar: J.-G. Giraud,

after considering the written observations submitted on behalf of :

- Factortame Limited and Others, by David Vaughan QC, Gerald Barling, Barrister-at-Law, David Anderson, Barrister-at-Law, and Stephen Swabey, Solicitor, of Thomas Cooper & Stibbard,
- the United Kingdom, by Timothy J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell QC, Solicitor General, Christopher Bellamy QC, Christopher Vajda, Barrister-at-Law, and Andrew Macnab, Barrister-at-Law,
- the Belgian Government, represented by Jr. L. Van de Vel, Director-General in the Ministry of Transport, acting as Agent,
- the Danish Government, represented by Jorgen Molde, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,
- the Government of the Federal Republic of Germany, represented by Ernst Roder, Regierungsdirektor in the Federal Ministry for Economic Affairs, and Gerhard Leibrock, Regierungsrat in that Ministry, acting as Agents,
- the Greek Government, represented by Elli-Markella Mamouna, a lawyer in the Special Legal Department for European Community Affairs at the Ministry of Foreign Affairs, acting as Agent,
- the Spanish Government, represented by Javier Conde de Saro, Director-General for Community Legal and Institutional Coordination, and by Rosario Silva de Lapuerta, Abogado del Estado, of the Legal Department for matters before the Court of Justice of the European [Union], acting as Agents,
- Ireland, by Louis J. Dockery, Chief State Solicitor, acting as Agent,
- the Commission, by Robert Fischer, Legal Adviser, and Peter Oliver, a member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral argument presented at the hearing on 17 January 1991 by Factortame Limited and Others, represented by David Vaughan QC; by Rawlings (Trawling) Limited, represented N. Forwood QC; by the United Kingdom; by the Belgian Government, represented by J. Van de Velde, Adviser in the Ministry of Foreign Affairs; by the Government of the Federal Republic of Germany, represented by Dr J. Karl ; by the Greek Government, represented by I. Galani-Maragkoudaki; by the Spanish Government; by Ireland, represented by J. O'Reilly SC; and by the Commission,

after hearing the Opinion of the Advocate General at the sitting on 13 March 1991,

gives the following

Judgment

- 1 By order dated 10 March 1989, which was received at the Court on 17 July 1989, the High Court of Justice of England and Wales, Queen's Bench Division, referred to the Court for a preliminary ruling under [Article 267 TFEU] four questions on the interpretation of provisions of [Union] law governing, in particular, the right of establishment and of the principles of proportionality and non-discrimination on grounds of nationality, with a view to determining the compatibility with [Union] law of national legislation laying down the conditions for the registration of fishing vessels.
- 2 The questions were raised in proceedings brought against the Secretary of State for Transport (hereinafter referred to as 'the Secretary of State') by Factortame Limited 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 in the main proceedings').

- 3 According to the documents before the Court, the applicants in the main proceedings 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 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 are 'plundered' by vessels flying the British flag but lacking any genuine link with the United Kingdom.
- 5 The 1988 Act provided for the establishment of a new register 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 1894 Act. However, only fishing vessels fulfilling the conditions laid down in section 14 of the 1988 Act may be registered in the new register.
- 6 Section 14(1) provides that, subject to dispensations to be 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'.

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 the vessel is beneficially owned by one or more qualified companies or, as to not less than 75%, 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.

- 7 Lastly, under section 14(4) the Secretary of State for Transport may dispense with the nationality condition in the case of an individual in view of the length of time he has resided in the United Kingdom and been involved in the fishing industry of the United Kingdom.
- 8 The 1988 Act and the 1988 Regulations came into force on 1 December 1988. However, under section 13 of the 1988 Act, the validity of registrations effected under the previous Act was extended for a transitional period until 31 March 1989.
- 9 At the time of the institution of the main proceedings, the applicants' 95 fishing vessels failed to satisfy one or more of the conditions for registration under section 14 of the 1988 Act 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 challenged the compatibility of Part II of the 1988 Act with [Union] law by means of an application for judicial review brought before the High Court of Justice of England and Wales, Queen's Bench Division, on 16 December 1988.

- 11 In order to resolve that dispute the High Court of Justice, Queen's Bench Division, referred the following questions to the Court for a preliminary ruling:

'Question 1

Does [Union] law affect the conditions under which a Member State lays down rules for determining which vessels are entitled to register in that State, to fly its flag and carry its nationality?

Question 2

In the light of the provisions and principles of [Union] law and in particular (but without limitation) the principle of non-discrimination on grounds of nationality, the right of establishment and the requirement of proportionality, is a Member State entitled to stipulate that in order to be registered in and entitled to fly the flag of that Member State, a fishing vessel:

- (a) must have its legal title vested as to 100% in citizens of that Member State, resident and domiciled therein, or vested in a company at least 75% of the shares [of] which are legally and beneficially owned by such persons and of which at least 75% of the directors are such persons (hereinafter called "a qualified company"); and
- (b) must be beneficially owned as to at least 75% by citizens of that Member State resident and domiciled therein, or as to 100% by one or more qualified companies, or as to part by one or more qualified companies provided that citizens of that Member State, resident and domiciled therein, hold at least 75% of the remaining property in the vessel; and
- (c) must be managed and its operations directed and controlled from within that Member State; and

- (d) must have as its charterer, manager or operator, a citizen of that Member State, resident and domiciled therein, or a qualified company,

in circumstances where no exception is made in respect of nationals of other Member States, save that the Member State has power to dispense with the nationality requirement in respect of an individual in view of the length of time such individual has resided in the Member State and has been involved in the fishing industry of the Member State?

Question 3

Is the answer to Question 2 affected by the existence of national catch quotas allocated to Member States pursuant to the Common Fisheries Policy?

Question 4

Are the answers to Questions 2 and 3 affected by the fact that the measure in question has been introduced with the object and effect of rendering a number of fishing vessels which immediately prior to the date of such measure coming into effect have been duly registered in and licensed to fish by the Member State in question and which are to a substantial extent beneficially owned by nationals of another Member State, resident and domiciled in that other Member State, ineligible to fly the flag of the first Member State with the result that they cease to be eligible to fish against the catch quotas allocated to the first Member State under the common fisheries policy unless ownership and management of the vessels are transferred to citizens of the first Member State resident and domiciled therein in accordance with the provisions of the said measure?

- 12 Reference is made to the Report for the Hearing for a fuller account of the facts in the proceedings before the national court, the course of the procedure and the written 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.

The first question

- 13 It must be observed in the first place that, as [Union] law stands at present, competence to determine the conditions for the registration of vessels is vested in the Member States. As far as fishing vessels in particular are concerned, the Court held in the judgment in Case 223/86 (*Pesca Valentia v Minister for Fisheries and Forestry* [1988] ECR 83, at paragraph 13) that the provisions 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) referred to fishing vessels 'flying the flag' of a Member State or 'registered' there but left those terms to be defined in the legislation of the Member States.
- 14 Nevertheless, powers which are retained by the Member States must be exercised consistently with [Union] law (see most recently the judgments in Case 57/86 *Hellenic Republic v Commission* [1988] ECR 2855, at paragraph 9, and in Case 127/87 *Commission v Hellenic Republic* [1988] ECR 3333, at paragraph 7).
- 15 The United Kingdom, the Kingdom of Belgium and the Hellenic Republic argue, however, that the position is different when it comes to the competence of each State under public international law to define as it thinks fit the conditions upon which it grants to a vessel the right to fly its flag. They refer in that connection to Article 5(1) of the Geneva Convention of 29 April 1958 on the High Seas (*United Nations Treaty Series* 450, No 6465), which reads as follows:

'Each State shall fix the conditions for the grant of nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.'
- 16 That argument might have some merit only if the requirements laid down by [Union] law with regard to the exercise by the Member

States of the powers which they retain with regard to the registration of vessels conflicted with the rules of international law.

- 17 Consequently, the answer to the first question must be that, as [Union] law stands at present, it is for the Member States to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag, but, in exercising that power, the Member States must comply with the rules of [Union] law.

The second question

- 18 By this question, the national court asks whether the three conditions to which the 1988 Act makes the registration of fishing vessels subject in the United Kingdom are compatible with [Union] law. It must therefore be construed as follows:

I. Must [Union] law and, in particular, the principles of freedom of establishment, non-discrimination on grounds of nationality and proportionality be interpreted as precluding a Member State from stipulating as conditions for the registration of a fishing vessel in its national register:

- (a) that the legal owners and beneficial owners and the charterers, managers and operators of the vessel must be nationals of that Member State or companies incorporated in that Member State, and that, in the latter case, at least 75% of the shares in the company must be owned by nationals of that Member State or by companies fulfilling the same requirements and 75% of the directors of the company must be nationals of that Member State;
- (b) that the said legal owners and beneficial owners, charterers, managers, operators, shareholders and directors, as the case may be, must be resident and domiciled in that Member State;

- (c) that the vessel in question must be managed and its operations directed and controlled from within that Member State?

II. Is the answer to question I above different where the power exists to dispense with the nationality requirement in respect of an individual in view of the length of time such individual has resided in the Member State in question and has been involved in the fishing industry of that Member State?

The nationality, residence and domicile requirements (point 1(a) and (b) of the national court's second question, as reformulated above)

- 19 At the hearing, the Commission argued that the registration of a vessel constituted in itself an act of establishment within the meaning of [Article 49 TFEU] et seq. and that therefore the rules on freedom of establishment were applicable.
- 20 It must be observed in that regard that the concept of establishment within the meaning of [Article 49 TFEU] et seq. involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.
- 21 Consequently, the registration of a vessel does not necessarily involve establishment within the meaning of the Treaty, in particular where the vessel is not used to pursue an economic activity or where the application for registration is made by or on behalf of a person who is not established, and has no intention of becoming established, in the State concerned.
- 22 However, where the vessel constitutes 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.
- 23 It follows that the conditions laid down for the registration of vessels

must not form an obstacle to freedom of establishment within the meaning of [Article 49 TFEU] et seq..

- 24 The United Kingdom and Belgium argue, however, that the registration of a vessel in a Member State is not a *conditio sine qua non* of establishment in that State, since natural persons or companies are not precluded from operating vessels, even fishing vessels, for instance from the United Kingdom, in the context of operations linked to the territory of that State; establishment in the United Kingdom in that way would be possible in respect of any vessel registered in one of the other Member States.
- 25 That argument cannot be upheld. According to the second paragraph of [Article 49 TFEU], freedom of establishment includes, in the case of nationals of a Member State, 'the right to take up and pursue activities as self-employed persons ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected ...'.
- 26 The United Kingdom, Belgium, Denmark and Greece consider that the Treaty does not preclude a nationality requirement of the type at issue in the main proceedings, because discrimination on grounds of nationality can arise only where, under the law of a Member State, persons are treated differently on account of their nationality. In contrast, in this case, what is involved is not discriminatory treatment on grounds of nationality but a condition for the grant of nationality, and the Member States are free to determine to whom they will grant or refuse their nationality, in the case of natural persons and ships alike.
- 27 In that connection, it must be observed that the concept of the 'nationality' of ships, which are not persons, is different from that of the 'nationality' of natural persons.
- 28 The prohibition of discrimination on grounds of nationality, which is set out in particular, as regards the right of establishment, in [Article 49 TFEU], is concerned with differences of treatment as between natural persons who are nationals of Member States and as between

companies who are treated in the same way as such persons by virtue of [Article 54 TFEU].

- 29 Consequently, in exercising its powers for the purposes of defining the conditions for the grant of its 'nationality' to a ship, each Member State must comply with the prohibition of discrimination against nationals of Member States on grounds of their nationality.
- 30 It follows from the foregoing that a condition of the type at issue in the main proceedings which stipulates that where a vessel is owned or chartered by natural persons they must be of a particular nationality and where it is owned or chartered by a company the shareholders and directors must be of that nationality is contrary to [Article 49 TFEU].
- 31 Such a condition is also contrary to [Article 55 TFEU], under which Member States must accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of [Article 54 TFEU].
- 32 As for the requirement for the owners, charterers, managers and operators of the vessel and, in the case of a company, the shareholders and directors to be resident and domiciled in the Member State in which the vessel is to be registered, it must be held that such a requirement, which is not justified by the rights and obligations created by the grant of a national flag to a vessel, results in discrimination on grounds of nationality. The great majority of nationals of the Member State in question are resident and domiciled in that State and therefore meet that requirement automatically, whereas nationals of other Member States would, in most cases, have to move their residence and domicile to that State in order to comply with the requirements of its legislation. It follows that such a requirement is contrary to [Article 49 TFEU].
- 33 It follows from the foregoing that it is contrary to the provisions of [Union] law and, in particular, to [Article 49 TFEU] for a Member State to stipulate as conditions for the registration of a fishing vessel

in its national register: (a) that the legal owners and beneficial owners and the charterers, managers and operators of the vessel must be nationals of that Member State or companies incorporated in that Member State, and that, in the latter case, at least 75% of the shares in the company must be owned by nationals of that Member State or by companies fulfilling the same requirements and 75% of the directors of the company must be nationals of that Member State; and (b) that the said legal owners and beneficial owners, charterers, managers, operators, shareholders and directors, as the case may be, must be resident and domiciled in that Member State.

The condition relating to the place of operation, direction and control of the vessel (point 1(c) of the second question, as reformulated)

- 34 In this regard, it is sufficient to point out that a requirement for the registration of a vessel to the effect that it must be managed and its operations directed and controlled from within the Member State in which it is to be registered essentially coincides with the actual concept of establishment within the meaning of [Article 49 TFEU] et seq., which implies a fixed establishment. It follows that those articles, which enshrine the very concept of freedom of establishment, cannot be interpreted as precluding such a requirement.
- 35 Such a requirement, however, would not be compatible with those provisions if it had to be interpreted as precluding registration in the event that a secondary establishment or the centre for directing the operations of the vessel in the Member State in which the vessel was to be registered acted on instructions from a decision-taking centre located in the Member State of the principal establishment.
- 36 Consequently, the reply to the national court must be that it is not contrary to [Union] law for a Member State to stipulate as a condition for the registration of a fishing vessel in its national register that the vessel in question must be managed and its operations directed and controlled from within that Member State.

The possibility of a dispensation from the nationality requirement (point II of the second question as reformulated)

- 37 This part of the question essentially asks whether the fact that the competent minister of a Member State has the power to dispense with the nationality requirement in respect of an individual in view of the length of time such individual has resided in that Member State and has been involved in the fishing industry of that Member State can justify, in regard to [Union] law, the rule under which registration of a fishing vessel is subject to a nationality requirement and a requirement as to residence and domicile.
- 38 It must be pointed out in this connection that, as the Court has consistently held, the mere fact that the competent authority is empowered to grant exemptions or dispensations cannot justify a national measure which is contrary to the Treaty, even if the power in question is in fact freely applied (see in particular the judgments in Case 82/77 *Openbaar Ministerie of the Netherlands v Van Tiggele* [1978] ECR 25 and in Case 27/80 *Fietje* [1980] ECR 3839).
- 39 Consequently, the answer to be given to the national court must be that the fact that the competent minister of a Member State has the power to dispense with the nationality requirement in respect of an individual in view of the length of time such individual has resided in that Member State and has been involved in the fishing industry of that Member State cannot justify, in regard to [Union] law, the rule under which registration of a fishing vessel is subject to a nationality requirement and a requirement as to residence and domicile.

The third question

- 40 It must be recalled in the first place that in its judgments in *Agegate* (Case C-3/87 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Agegate Limited* [1989] ECR 4459) and *Jaderow* (*The Queen v Minister of Agriculture, Fisheries and Food, ex parte Jaderow Limited* [1989] ECR 4509) the Court held that, when exercising the power granted to them to define the detailed rules for the utilization of their quotas, the

Member States may determine which vessels in their fishing fleets will be allowed to fish against their national quotas, provided that the criteria employed are compatible with [Union] law. In the judgment in *Jaderow*, the Court ruled, *inter alia*, that a Member State may lay 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.

- 41 Secondly, it must be observed that it is not the purpose of national legislation governing the registration of vessels, such as that at issue in the main proceedings, to define the detailed rules for the utilization of quotas. Consequently, whatever the objectives pursued by the national legislature, such legislation cannot be justified by the existence of a [Union] system of national quotas.
- 42 The reply to the third question must therefore be that the existence of the present system of national quotas does not affect the replies given to the second question.

The fourth question

- 43 The fourth question is to be answered in the event that the Court should consider that [Union] law does not preclude nationality, residence and domicile requirements of the type at issue in the main proceedings. Since that is not the case, there is no need to give a ruling on the fourth question.

Costs

- 44 The costs incurred by the United Kingdom, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, Ireland and the Commission of the European [Union], which have submitted observations to the Court, 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 questions referred to it for a preliminary ruling by the High Court of Justice of England and Wales, Queen's Bench Division, by order of 10 March 1989, hereby rules:

1. As [Union] law stands at present, it is for the Member States to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag, but, in exercising that power, the Member States must comply with the rules of [Union] law;
2. It is contrary to the provisions of [Union] law and, in particular, to [Article 49 TFEU] for a Member State to stipulate as conditions for the registration of a fishing vessel in its national register: (a) that the legal owners and beneficial owners and the charterers, managers and operators of the vessel must be nationals of that Member State or companies incorporated in that Member State, and that, in the latter case, at least 75% of the shares in the company must be owned by nationals of that Member State or by companies fulfilling the same requirements and 75% of the directors of the company must be nationals of that Member State; and (b) that the said legal owners and beneficial owners, charterers, managers, operators, shareholders and directors, as the case may be, must be resident and domiciled in that Member State;
3. It is not contrary to [Union] law for a Member State to stipulate as a condition for the registration of a fishing vessel in its national register that the vessel in question must be managed and its operations directed and controlled from

within that Member State;

4. The fact that the competent minister of a Member State has the power to dispense with the nationality requirement in respect of an individual in view of the length of time such individual has resided in that Member State and has been involved in the fishing industry of that Member State cannot justify, in regard to [Union] law, the rule under which registration of a fishing vessel is subject to a nationality requirement and a requirement as to residence and domicile;
5. The existence of the present system of national quotas does not affect the replies given to the second question.

Due	Mancini	O'Higgins	Moitinho de Almeida
Rodriguez Iglesias		Diez de Velasco	Slynn
Kakouris	Joliet	Grevisse	Zuleeg

Delivered in open court in Luxembourg on 25 July 1991.

J.-G. Giraud
Registrar

O. Due
President