

INTERIM ORDERS AGAINST THE STATE: A COMPARATIVE NOTE

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A striking example of differing judicial attitudes, and the historical traditions and legal concepts on which they depend, is provided by the recent decision of the House of Lords in *R. v. Secretary of State for Transport, ex. p. Factortame*¹ and the conclusions to be derived from the papers presented at a "Study Day" held at the British Institute of International and Comparative Law and the Centre of European Law, King's College, London, on 12 February 1990.²

In the *Factortame* case, the applicants for judicial review were a number of companies incorporated under United Kingdom law and their directors and shareholders, most of whom were Spanish nationals. They owned between them 95 deep sea fishing vessels which had been registered as British under the Merchant Shipping Act 1894. It became clear that after 31 March 1989 these vessels would, by virtue of Part II of the Merchant Shipping Act 1988 and the Regulations made thereunder, no longer qualify for registration as British fishing vessels, unless they satisfied certain conditions relating to the extent of their British ownership and management. These conditions were designed to prevent foreign operators under the British flag from obtaining a share of the United Kingdom's quota as assigned to it by the Common Fisheries Policy of the European Community.

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1. [1990] A.C. 85. For a penetrating analysis of the legal issues in this case, I am deeply indebted to two notes by Sir William Wade Q.C. in (1991) 107 L.Q.R. 1-4, 4-10.

2. The papers have been made available to me through the kindness of the Director of the British Institute of International and Comparative Law, Mr. Piers Gardner. They include a comparative survey as to "the availability and effect of proceedings to challenge legislative action in certain European jurisdictions and interim measures against the State" which has been prepared by the Institute and dated 26 October 1989. An Addendum, dated 29 March 1990, covers material submitted by the Commission to the Court of Justice of the European Communities in Case 213/89 and refers to remedies before certain administrative tribunals in some Member States to suspend "State measures."

The applicants complained that: (1) the Act of 1988 and its Regulations were in violation of certain articles of the Treaty of Rome of 1957 setting up the European Economic Community and (2) the substantial period which would elapse before the Court of Justice of the Community would determine the first point would inevitably involve the applicants in serious loss, and that, therefore, the operation of the 1988 Act, so far as it would deprive the vessels of their British status, should be suspended. The Queen's Bench Divisional Court decided to refer the first question to the European Court of Justice in accord with Article 177 of the Treaty of Rome; its response to the second question was to suspend the relevant parts of the Merchant Shipping Act 1988, pending its final judgment in the light of the response given by the European Court of Justice. The Court of Appeal refused to uphold the decision of the Divisional Court on the second point on the ground that *under English law* a court had no power to suspend the operation of an Act of Parliament. The House of Lords took the same view and referred to the European Court of Justice the question whether *under Community law* a national court had the obligation to provide interim protection to rights claimed under the Community Treaty when challenged by provisions of national legislation. When the European court replied affirmatively to this question,³ the House of Lords was prepared to order the Secretary of State for Transport to disregard the requirements of the Merchant Shipping Act 1988 and to leave the applicants' vessels on the British register for the time being. The constitutional change implied is considerable. The decision could be given the conventional form of simply following an Act of Parliament, namely the European Communities Act 1972, which required rights given under the Community Treaties to be recognized by and to be given effect in English law.⁴ But this disguises the striking departure from the hitherto usual understanding of the sovereignty of Parliament, which has generally been taken to mean that Parliament cannot bind its successor and therefore could not as a matter of English law invalidate in advance by the Act of 1972 what Parliament decided in 1988.

3. On 19 June 1990.

4. Section 2(1) of the European Communities Act 1972 is as follows: All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this sub-section applies.

Unnecessarily in the event, in the light of the decision of the European Court, the House of Lords also stated its reasons why *as a matter of English law alone* an interim injunction could not be obtained against a minister of the Crown (or even a declaration of the injunction which might have been granted if there had been no Crown element). At this point I gratefully accept the lifeline thrown out by Sir William Wade Q.C. to anyone "plunging into the morass of technicalities with which the courts have inundated this subject," and I accept his conclusions as to what the House of Lords ought to have held.⁵ However, for the present purpose of comparing judicial attitudes, what is significant is the employment of certain arguments and the conclusions drawn from them at the highest judicial level, about what in the broadest sense are actions against the State, whether or not they are soundly based.

In the first place, the *Factortame* case⁶ holds that officers of the Crown in respect of powers conferred on them by name were before the Crown Proceedings Act 1947 immune from suit, and that that Act has not altered their position.⁷ Secondly, it supports⁸ the questioned decision of *Mericks v. Heathcoat-Amory*⁹ in which it had been held that the Act of 1947 specifically prevented any injunction being issued against a minister exercising statutory powers. Thirdly, it rejects¹⁰ the decision of Hodgson J. in *R. v. Home Secretary, ex parte Herbage*¹¹ supported by the majority of the Court of Appeal in *R. v. Licensing Authority established under the Medicine Act 1968, ex p. Smith Kline and French Laboratories*,¹² which, relying on application for judicial review provided for by § 31 of the Supreme Court Act 1981, held that injunctions might lie against officers of the Crown, even, if the circumstances required it, in interim form. Fourthly, the *Factortame*

5. See the second of the two notes in (1991) 107 L.Q.R. 4-10 referred to in n. 1 above.

6. [1990] 2 A.C.85, 145(G). Wade (n. 5 above) forcibly and persuasively argues that it is a cardinal principle of English administrative law that where powers are conferred on ministers or other servants of the Crown they do not enjoy any immunity which the Crown may be able to assert.

7. S.21(2) of the 1947 Act excluded injunctions or orders against any officer of the Crown if the effect would be to give any relief which could not have been obtained in proceedings against the Crown. Wade says that this merely refers to the principle that superior officers of the Crown are not *as such* vicariously liable for the wrongs of inferior officers; see, e.g., *Bainbridge v. Postmaster-General* [1906] 1 K.B. 178.

8. [1990] 2 A.C.85, 148(B).

9. [1955] Ch. 567.

10. [1990] 2 A.C.85, 150(H).

11. [1987] Q.B. 872.

12. [1990] Q.B. 574.

case demonstrates the unwillingness of English judges¹³ to use the convenient device of a declaration to avoid what seems to be considered a conceptual awkwardness in a court sitting under the authority of the Crown being called on to make any kind of order against the Crown. Comparison with the control of the State authorities by the courts in Civil Law countries¹⁴ suggests however that the awkwardness arises from the failure of English judges (and of Parliament) to recognize that the Crown represents two different symbols--the Crown as the State and the legal settlement on which it rests, and the Crown as the executive arm of government. To the former the courts are indeed answerable, but it is for the courts to control and regulate the latter to the extent which that settlement requires.

The present state of interlocutory relief in administrative law in England may be instructively compared with the extent of such relief in France.¹⁵ It might be expected that, as in that country judicial control of the administration is the function of the *Section du Contentieux* of the Conseil d'Etat which itself sprang from the executive power, there would be similar reluctance to make mandatory orders--and *a fortiori* interlocutory orders--against the administration as has been shown in the making of such orders against the Crown.¹⁶ And in fact we find

13. In *Factortame* see [1990] 2 A.C.85, 150(D). See also what Wade (*op. cit.* n. 5 above) calls "the mysterious judicial reluctance" to allow injunctive relief against central government in any form as shown by *R. v. Inland Revenue Commissioners, ex p. Rossminster*, [1980] A.C. 952, 1027, especially Lord Scarman's warning against pushing judicial review to extremes which "obscure the fundamental limits of the judicial function" and his view that if interim relief is to be given against the Crown something less "risible" than an interlocutory declaration would have to be found.

14. See below concerning the position in France and Germany. In common-law countries beyond England on the other hand the maxim "The King can do no wrong," even in countries which have adopted a republican form of government, can cause confusion. See H.B. JACOBINI, INTRODUCTION TO COMPARATIVE ADMINISTRATIVE LAW, p. 36 (1991), who goes so far as to say that the maxim "is more flagrantly applied in the United States than in Great Britain."

15. I have deliberately limited my comparisons with English law to two somewhat different systems of administrative law within the civil-law jurisdictions, relying on *Interim Relief Against Public Authorities in French Administrative Law* by M. Roger Errera, Conseiller d'Etat and *Remedies Against the State in the Federal Republic of Germany* by Professor Eberhard Grabitz of the Free University of Berlin. Both these papers were presented at the Conference mentioned in n. 2 above.

16. S.21(1) of the Crown Proceedings Act 1947 provides that:
[I]n any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make on proceedings between subjects and otherwise to give such appropriate relief as the case may require;

that this expectation is justified insofar as the Conseil d'Etat in principle refuses to order the administration to act. However, since a decision in 1970¹⁷ it has been prepared to stay a "negative" decision of the administration (i.e., a refusal to do what the administration ought to do), if the effect would be to alter the position of the applicant disadvantageously, in spite of the effect being to disregard this principle. This concession has been applied, for example, to allow a stay in execution of a refusal to grant a *carte de séjour* to an alien.¹⁸ Apart from the special position of "negative" decisions and some restriction of the power in this respect of provincial administrative courts, as distinguished from the Conseil d'Etat, French administrative law can and does grant interim remedies against the administrative authorities of the State provided two conditions are met: (1) that there are serious grounds on which the administrative decision in question might be quashed; (2) that the complainant would suffer uncompensable damage if the decision was ultimately quashed but he had not been granted interim relief. Specific legislation, relating, for example, to the deportation of aliens and to the granting of building permits, has listed cases where it has to be assumed that the second condition is satisfied. In general, both the English and French systems

Provided that (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance but may in lieu thereof make an order declaratory of the rights of the parties.

The Law Commission in Law Com. No. 73 in 1976 proposed--but the proposal was not accepted by the government--that in § 21 of the Crown Proceedings Act 1947 it should be provided that

the court shall not grant an injunction or order specific performance but may in lieu thereof--(i) in a case where the court is satisfied that it would have granted an interim injunction if the proceedings had been between subjects, declare the terms of the interim injunction that it would have made or (ii) make an order declaratory of the rights of the parties.

This was the suggestion which Lord Scarman thought "risible" (*see n. 13 above*). Wade (*n. 5 above*) points to the emphatic and inclusive language of the original Act--"In any civil proceedings by or against the Crown, the court shall, subject to the provisions of this Act [which nowhere excludes specifically interim remedies] have power to make all such orders as it has power to make between subjects and otherwise to give such appropriate relief as the case may require." (emphasis added). If *Factortame* must be accepted, it must also be said that English law would deny injunctions against Crown servants.

17. *Ministère de l'Etat chargé des Affaires Sociales c. Ambros*, 23 January 1970k, *Recueil*, p. 5, A.H.D.A., 1970, 174, note Delcros, R.D.P. 1970, 1035, note Waline.

18. *M'Sirdi*, 1 July 1977, *Recueil*, p. 927.

of judicial control of the administration, especially in regard to interlocutory remedies, exhibit technical limitations which cannot be simply attributed to a justifiable regard for good administration but which have their origins in historic inhibitions of the judiciary vis à vis the administration. So far as England is concerned, the *Factortame* case seems to have underlined those inhibitions just at a time when the Crown Proceedings Act 1947 and more recently the introduction of the application for judicial review (including the possibility of a declaration) by the Supreme Court Act 1981 opened the way to comprehensive judicial control over the administration.

The German law on interim relief in the administrative courts, marking as it does a clean break with the past and the supremacy of the State under National Socialism, lays down in paragraph 80(1) of the *Verwaltungsgerichtsordnung* that any action to rescind an administrative act automatically suspends its operation, unless (paragraph 80(2)) federal law or an administrative authority orders its immediate enforcement. In the latter event, the court seized of the action decides whether an interim order is to be made (paragraph 80(5)). Paragraph 123 of the same enactment sets out the conditions on which such an order may be made. They are very similar to those for granting interim orders in France: the court has to take into account the chances of success in the main action and to balance the harm done to the administration by suspension of the administrative act, if that act is ultimately upheld, against the hardship to the complainant if the act is not suspended but in the event is proved unlawful. And although in this brief note attention has been concentrated on interim remedies against the administration rather than on suspension of legislation, it should be added that under paragraph 32 of the *Gesetz über das Bundesverfassungsgericht* the German Constitutional Court can make an interim order suspending the operation of any legislation which is alleged to be in violation of *Grundgesetz* "to avoid severe disadvantages, to prevent imminent violence or for some other important reason." It was the lack of any comparable provision in English law which created difficulty for the House of Lords in the *Factortame* case and which eventually compelled them, on receiving the ruling of the Court at Luxembourg, to take the novel step of suspending the Merchant Shipping Act 1988.¹⁹

19. The French courts, as also the English courts, have no power to override legislation. However, as the French legal system, as much as the English legal system (by the European Communities Act 1972), has to incorporate within French law the decisions of the European Court of Justice on Community Law, it is to be assumed that the Conseil d'Etat would acquiesce in the same way as ultimately did the House of Lords in the *Factortame* case on receiving the decision of the Court of the European Communities.

It is not the intention of this note to suggest that study of French or German administrative law necessarily reveals a more satisfactory control of the administration than is effected by the ordinary judges under English law. What emerges with particular reference to interim orders of the courts is that such remedies against the administration can best be considered on their merits without the necessity of first negotiating the barrage of technicality with which they are surrounded in English law. And it would seem *prima facie* likely that the questions concerning the working of the administration which necessarily arise in the granting of interim orders are best considered by judges who, as in France and Germany, have a specialized practical knowledge of the workings of executive government.

