

# Factortame: Does Britannia Still Rule the Waves?

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In the twenty years since the U.K. joined the European Community we have become used to newspapers bemoaning the fact that the Community (through the Commission) was against our crisps, sausages, bathing water, noise levels and newspaper boys. All these actions we were told by the newspapers were attacks on our "sovereignty". Sovereignty in this sense is taken to mean the supremacy of Parliament.<sup>1</sup> That is that Parliament has the unfettered right to make or repeal any domestic law. Parliament has jurisdiction over the territory in its hands and presides over a system of laws and procedures which is free from outside interference. Even when the U.K. entered into international treaties and has enacted statutes to implement treaty provisions, these statutes are regarded as in no way different from ordinary Acts of Parliament.<sup>2</sup>

Although the issues of sovereignty and the supremacy of Parliament have been recurring features since our accession to the E.C. in 1973, *R. v. Secretary of State for Transport, ex parte Factortame*<sup>3</sup> brought them to the forefront of attention again. This article will attempt to trace the developments in these areas that culminated in the judgments in the *Factortame* case.

If we say that sovereignty means the ability to legislate independently of any other state, if it means that our domestic laws will prevail over all other external laws, then the U.K. long ago gave up some of its sovereignty. Even before our membership of the E.C. we accepted limitations on our right to act or legislate in certain areas. One has only to think of the Hague and Geneva conventions, GATT, the United Nations, NATO and other international treaties.

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1. Wade and Bradley, *Constitutional and Administrative Law* 10th Ed. (1986), p.65, describe the doctrine of sovereignty or legislative supremacy of Parliament as consisting essentially of "a rule which governs the legal relationship between the courts and the legislature, namely that the courts are under a duty to apply the legislation made by Parliament."

2. For a discussion of the general debate on sovereignty, see Craig, "Sovereignty of the United Kingdom Parliament after Factortame", 11 *Yearbook of European Law* 1991, pp.221-255.

3. Case 213/89 [1990] 1 E.C.R. 2433, [1990] 3 C.M.L.R. 1+375.

Even before the U.K. joined the E.C. it was well established that Community law was supreme when in conflict with national domestic law and that member states had abrogated a part of their sovereignty to the Community. This was first established in *Van Gend en Loos*<sup>4</sup> where the European Court of Justice (E.C.J.) said that Member states “have limited their sovereign rights, albeit within limited fields.”

In *Costa v. ENEL*<sup>5</sup> the Court was asked if it could give a ruling in a situation where a national law seemed applicable in the particular case as against a Community law. While the Court would not rule on the compatibility of national law with Community law, it did say that:

“ . . . transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.”<sup>6</sup>

This concept of the supremacy of Community law was given further impetus in *Internationale Handelsgesellschaft*<sup>7</sup> where the E.C.J. said:

“ . . . the validity of a Community Measure or its effect within a member state cannot be effected by allegations that it runs counter to . . . the principles of a national constitutional measure.”<sup>8</sup>

In *Simmenthal*<sup>9</sup> the court went even further and said:

“ . . . any national court must . . . apply Community law in its entirety . . . and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.”<sup>10</sup>

In 1973 when the U.K. joined the E.C. the Treaty of Rome which it signed was incorporated into U.K. law by the European Communities Act 1972. Section 2(1) of the Act states that the principles established by the Treaty “are without further enactment to be given legal effect”. Section 2(4) provides that “any enactment passed or to be passed” must be construed subject to the foregoing. This gives rise to a few problems as to whether this section does give priority to E.C. law thereby limiting the sovereign rights of the U.K. The traditional view has been to treat section 2(4) as a rule of construction. It would seem so long as section 2(4) is applied as a rule

4. Case 26/62 [1963] E.C.R. 1.

5. Case 6/64 [1964] E.C.R. 585.

6. At p.594.

7. Case 11/70 [1970] E.C.R. 1125.

8. At p.1134.

9. Case 106/77 [1978] E.C.R. 629.

10. At p.644.

of construction our courts would remain free to apply an English statute which was contrary to E.C. law and it is clear that Parliament wished to breach its Community obligations.

This rule of construction was useful in so far as it enabled the U.K. courts to avoid any outright statement of the supremacy of Community law.<sup>11</sup> But it did lead to some initial confusion in the courts. In a number of cases the courts were prepared to give precedence to E.C. law over U.K. law if there was a conflict but in other cases they construed inconsistencies between E.C. law and U.K. law in favour of the latter.

The first of these approaches can be seen as early as 1979 in *Macarthys Ltd. v. Smith*.<sup>12</sup> This case broke new ground in that it was the first case to be given the "European view". Cummings-Bruce and Lawton L.J.J. citing *Costa* and in particular the *Simmenthal* case were prepared to give priority to European law.<sup>13</sup> Lord Denning MR preferred to see the case as one of interpretation or construction of section 2(4) and he interpreted the Equal Pay Act 1970 to conform with the principle of equal pay for equal work as set out in Article 119 E.C.<sup>14</sup> He said:

"we are entitled to look to the Treaty as an aid to its construction: and even more, not only as an aid but as an overriding force".<sup>15</sup>

He was also prepared to say that if domestic legislation was inconsistent with E.C. legislation then "it is our bounden duty to give priority to Community law."

The House of Lords continued with the rule of construction approach in *Garland v. British Rail Engineering Ltd.*<sup>16</sup> Once again, the case involved a conflict between the Equal Pay Act 1970 and Article 119 E.C. In the earlier hearing of the case the courts had been prepared to construe section 6(4) of the Act as allowing derogation from the principle of equal pay if the discriminatory provisions related to death or retirement. The plaintiff sought to rely on Article 119 E.C. The House of Lords said that section 6(4) must be construed with Article 119. Lord Diplock said that national courts must construe domestic law to conform, "no matter how wide a departure from the *prima facie* meaning may be needed to achieve consistency."<sup>17</sup>

In both the above cases there was no real difficulty in construing domestic law to conform to E.C. law. In these cases it appeared that the House of Lords had managed to adopt a "rule of construction" approach to accommodate the idea of the supremacy of E.C. law with Parliamentary sovereignty. But a quartet of cases that came before the House of Lords threw doubt on this consensual approach. The first of these cases

11. Collins *European Community Law in the United Kingdom* 4th Ed. (1990), p.135ff. for a discussion of this issue.

12. [1979] 3 All E.R. 325.

13. At pp. 335.

14. At p.329.

15. *Ibid.*

16. [1983] 2 A.C. 751.

17. At p.771.

was *Duke v. GEC Reliance*.<sup>18</sup> In the *Macarthy's* and *Garland* cases there had been no great difficulty in construing domestic law in line with E.C. law. However, in *Duke* the issue in question, section 6(4) of the Sex Discrimination Act 1975, had been passed before the provision relied on by Ms. Duke, viz. the Equal Treatment Directive of 1976.<sup>19</sup> It was also clear that the Act was not passed to give effect to the Directive. In those circumstances Lord Templeman refused to construe section 6(4) of the domestic Act to give effect to the Directive. In a trenchant passage he said:

“Section 2(4) of the European Communities Act does not in my opinion enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community Directive which has no direct effect between individuals.”<sup>20</sup>

The House therefore rejected Ms. Duke's claims. Thus there has arisen a distinction between domestic legislation passed to implement a Directive and legislation which pre-dated the Directive. In the former, the House of Lords was prepared by use of the “rule of construction” under section 2(4) of the European Communities Act to give priority to E.C. law. In the latter, it considered that to give priority to E.C. law would require a distortion of a British statute which it was not prepared to do.

In *Finnegan v. Clowney Youth Training Programme Ltd.*<sup>21</sup> the House was given an opportunity to reconsider its position. The issue was similar to that in *Duke*, except that the relevant legislation was Article 8(4) of the Sex Discrimination (Northern Ireland) Order 1976. This was a parallel provision to section 6(4) of the Sex Discrimination Act 1975 except that it had been passed after the Equal Treatment Directive. Also, in the case of *Johnston v. Chief Constable of the Royal Ulster Constabulary*<sup>22</sup> the E.C.J. had ruled that the Order should be interpreted in the light of the Equal Treatment Directive. Despite these distinctions the House of Lords held there was no material distinction between the Northern Ireland Order and the Sex Discrimination Act. It said that the accident of timing of the Order was irrelevant and in also ignoring the distinction in *Johnston* it refused to give a purposive construction to the Order. Once again it said that national law not passed to implement Community law would take priority over subsequent Community legislation.

However, in two cases the House was prepared to allow priority to Community law passed before a piece of domestic legislation. The two cases also illustrate a striking departure from the normal approach of the British judiciary. The first of the cases

18. [1988] 1 All E.R. 626.

19. Dir. 76/207 OJ L39/40.

20. At p.636.

21. [1990] 2 All E.R. 546.

22. Case 222/84 [1986] E.C.R. 1651.

was *Pickstone v. Freemans p.l.c.*<sup>23</sup> The Equal Pay Act 1970 had been amended by statutory instrument in 1983 to comply with the Equal Pay Directive.<sup>24</sup> The 1983 amendments were less than clear and led Lord Oliver to observe that “the strict and literal construction of the section does indeed involve the conclusion that the Regulations although purporting to give full effect to the United Kingdom’s obligations under Article 119, were in fact in breach of those obligations.”<sup>25</sup> The House examined the Directive, and the E.C.J. decision which had led to the 1983 amendments and in an unprecedented step had consulted *Hansard* to determine the motive for the national legislation. Based on these examinations Lord Oliver was able to depart from the literal wording of the legislation. He said:

“ . . . a construction which permits the section to operate as a proper fulfilment of the United Kingdom’s obligations under the Treaty involves not so much doing violence to the language of a section as filling a gap by implication which arises, not from the words used, but from the manifest purpose of the Act and the mischief it was intended to remedy.”<sup>26</sup>

Lords Keith, Brandon and Jauncey expressly concurred with Lord Oliver. Remarkably, Lord Templeman, who had given the leading judgment in *Duke* a year earlier, now said:

“ . . . I can see no difficulty in construing the Regulations of 1983 in a way which gives effect to the declared intentions of the Government . . . and is consistent with the objectives of the E.C. Treaty. . . .”

This willingness to overrule a piece of domestic legislation was extended again in the case of *Litster v. Forth Dry Dock*.<sup>27</sup> The Transfer of Undertakings (Protection of Employment) Regulations 1987 had been passed to implement the Acquired Rights Directive.<sup>28</sup> When, as in this case, there was a conflict between the words of the Regulations and those of the Directive, the House of Lords was prepared to treat the words of the Directive as overriding the words of the domestic Regulations. Lord Keith said:

“ . . . the precedent established in *Pickstone* . . . indicates that this is to be done by implying the words necessary to achieve that result”.<sup>29</sup>

23. [1989] A.C. 66.

24. Dir. 75/117 OJ L45/19.

25. At p.127.

26. At p.125.

27. [1989] 1 All E.R. 1134.

28. Dir. 77/187 OJ L61/27.

29. At p.1136.

Lord Oliver was prepared to add words to the regulations to enable the legislation to “fulfil the purpose for which they were made of giving effect to the provisions of the Directive”, and Lord Templeman was again also prepared to imply words into the Regulations to enable them to comply with Community obligations.

The *Duke and Finnegan* cases have been criticised<sup>30</sup> but any unfairness that was felt to be in these decisions has been addressed by a decision of the E.C.J. in case *Marleasing S.A. v. La Comercial Internacional de Alimentacion S.A.*<sup>31</sup> The case arose out of a conflict between the Spanish Civil Code and an E.C. Company Law Directive<sup>32</sup> which was unimplemented in Spain. In its decision the Court broke new ground by holding:

“It follows that in applying national law, whether the provisions pre-date or post-date the Directive, the national court asked to interpret national law is bound to do so in every way possible in the light of the text and the aim of the Directive to achieve the result envisaged by it and thus to comply with Article 189(3) of the Treaty.”<sup>33</sup>

The effects of this case have ramifications for the concept of sovereignty. Although the E.C.J. did concede that Directives should be followed only “so far as possible” bearing in mind the principles of legal certainty and non-retroactivity, it does now appear that the “rule of construction” approach has been severely circumscribed.<sup>34</sup>

Although questions of sovereignty and the supremacy of Parliament have been a recurring feature since our accession in 1973 the *Factortame* case brought them to the forefront of attention again. Indeed, the judgment in the case was treated by some sections of the press as if 1066 had happened again. *The Times* editorial of 26th July 1991 called it a “Slap on the face for Parliament”. The facts of the case are well known. In an attempt to prevent “quota-hopping” by Spanish fishermen operating behind nominally British companies, the U.K. Government passed the Merchant Shipping Act 1988 and a series of delegated regulations. The legislation set out residence and domicile conditions for fishing companies, the effect of which was to disqualify 95 Spanish fishing boats from fishing from British ports. The companies sought interim relief by means of judicial review in the Divisional Court. The grounds on which they sought interim relief were that the Act and regulations were contrary to Articles 7, 52, 58 and 221 of the Treaty and that interim relief was needed because of the irreparable damage that would be caused if the companies had to wait for the full trial to come before the court.

In the Divisional Court, a brave Neil LJ granted provisional relief. Relying on *Simmenthal* he said:

30. See Docksey and Fitzpatrick, “The Duty of National Courts to Interpret Provisions of National Law in Accordance with Community Law”, I.L.J. (1992) 21, p.113.

31. Case C-106/89 [1990] E.C.R. 4135.

32. Dir. 68/151 OJ L65.

33. At p.4159.

34. See Saunders, “*Marleasing*: A Fatal Blow to the Rule of Construction”, *Euro. Bus. Law Rev.* Dec. 1992, p.339.

“The High Court now has a duty to take account of and give effect to E.C. law and where there is a conflict, to prefer Community law to national law.”

On appeal by the U.K. Government to the Court of Appeal the interim relief was set aside on the grounds that under the British Constitution the courts have neither the power to suspend the application of an Act of Parliament nor to grant an injunction against the Crown (*i.e.*, the Government).<sup>35</sup>

When the case was further appealed to the House of Lords, Lord Bridge held that there is a presumption that an Act of Parliament was compatible with Community law unless and until it was decided otherwise, but that nevertheless, by section 21 of the Crown Proceedings Act 1947 there was no jurisdiction to grant interim relief. However, the House made an Article 177 reference to the E.C.J. which asked, *inter alia*, whether E.C. law empowers or imposes an obligation on a national court to grant interim relief in a situation where a preliminary reference has been made to the E.C.J.

The reply from the E.C.J. should not have come as a total surprise. Anthony Bradley, Editor of *Public Law*, commented that although the outcome had been foreshadowed, “it was the clearest case of an Act of Parliament being held irreconcilable with Community law.” The Court replied in the affirmative basing its judgment on the twin pillars of Article 5 and its previous and recent decision in *Simmenthal*.<sup>36</sup> The court stressed the importance of ensuring that direct effect was a matter of substance, not form and further held:

“. . . the full effectiveness of Community law would be . . . impaired if a rule of national law could prevent a national court . . . from granting provisional relief . . . It follows that a court which . . . would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.”<sup>37</sup>

The *Factortame* decisions have obvious and perhaps damaging ramifications for the British fishing industry,<sup>38</sup> but the major area of interest is the effect on British constitutional law. Prior to *Factortame* it could be argued that U.K. courts had not unequivocally accepted the supremacy of E.C. law. We have seen that the twin conflicting claims of this supremacy and the British constitutional principle of parliamentary sovereignty have been accommodated by the device of the “rule of construction”. But now *Factortame* makes it clear that a national court is under a

35. See Ross, “Refining Effective Enjoyment”, (1990) 15 E.L. Rev. 476.

36. See Barav, “Enforcement of Community Rights in the National Courts”, [1989] 26 C.M.L. Rev. 369 and Gravells, “Disapplying an Act of Parliament Pending a Preliminary Ruling: Constitutional Enormity or Community Law Right”, [1989], P.L. 568.

37. At para. 21 of judgment.

38. See Churchill, “Quota Hopping: The Common Fisheries Policy Wrong-Footed?”, 27 C.M.L. Rev. (1990) 209 and case note in 29 C.M.L. Rev. (1992) 405.

Community law obligation to give effective protection to directly effective rights, and this will be so even in the face of conflicting domestic legislation.

The source of this obligation is Article 5 E.C. This reflects a growing reliance by the E.C.J. on the "gap filling" properties of this Article. Article 5 has become the "tool" by which the E.C.J. has developed general principles of Community law to ensure the effective judicial protection of individual rights.

The E.C.J. went on to say that the duty upon national courts "cannot fail to include the provision of interim relief".<sup>39</sup> But the court did not go on to say on what basis such interim relief was to be awarded. This is still to be a matter for applying national criteria as set out in *American Cyanamid v. Ethicon Ltd.*<sup>40</sup> The crucial point is that interim relief should be available and if necessary the national courts would have to invent a system of reliefs.

What lessons does the *Factortame* decision hold for U.K. law? It can certainly be concluded that any lingering doubts about the supremacy of Community law over domestic law have been laid to rest. Lord Bridge in *Factortame* expressed it thus:

"under the terms of the European Communities Act 1972 it has always been clear that it was the duty of a U.K. court when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of E.C. law. . . . Thus . . . to insist that national courts must not be inhibited by rules of national law from granting interim relief . . . is no more than a logical recognition of that supremacy."<sup>41</sup>

The only uncertainty left in this area is the question of what the position would be if an Act expressly said it was to take effect notwithstanding the European Communities Act. Or if some equally clear form of words was used? It may be well that the English courts would have to follow the domestic legislation. But the supremacy of E.C. law was well established in the jurisdiction of the Court of Justice long before the United Kingdom joined the Community. So, whatever limitations to its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. For Parliament to change its stance to such an extent would require a renegotiation of the Treaty of Rome. This is an unlikely scenario.

*Factortame* is important on a wider basis. It, together with the *Emmott, Francovich* and *Zuckerfabrik*<sup>42</sup> cases represent a new development in Community law. Up until recently priority had been given to the establishment of a Community legal order, separate from national law and giving rights which individuals could plead in their

39. At p.2474.

40. [1977] A.C. 396. See remarks made by Lord Goff in the House of Lords as to the appropriateness of this approach: (1990) 3 C.M.L.R. 375, at p.385 and Algazy, "The Crown, Interim Relief and E.C. Law", 141 N.L.J. (1991), at p.1303.

41. (1990) 3 C.M.L.R. 375, at p.380.

42. Case C-208/90 [1991] E.C.R. 1-4869; Cases C-6/90 & C-9/90 [1993] 2 C.M.L.R. 66; Cases C-143/88 & C-92/89 [1991] E.C.R. 1-415.

national courts. It was this concept of the direct effect of Community law that the court fought to establish. This battle appears to be won! All the national courts have accepted the supremacy of the community legal order. What *Factortame* and the other cases illustrate is a move by the E.C.J. towards the provision of effective judicial remedies. It is now the application of E.C. law which has become the focus of attention. The decisions can also be seen as representing a major shift towards a partnership of E.C. law and national legal systems. This can only strengthen the remedies available to individuals and will lead to the availability of these remedies within an E.C. context. Certainly, the House of Lords appears to have accepted that a purposive approach, even overruling national legislation, is an essential and integral part of the development of E.C. law.