[2001] 1 All ER 850

R v Secretary of State for Health and others, ex parte Imperial Tobacco Ltd and others

HOUSE OF LORDS
LORD SLYNN OF HADLEY, LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD CLYDE AND LORD MILLETT

22–24 MAY, 7 JULY, 7 DECEMBER 2000

Jonathan Sumption QC, David Anderson QC and Jemima Stratford (instructed by Lovells) for the appellants.
Christopher Vajda QC and Sarah Moore (instructed by the Solicitor to the Department of Social Security and Department of Health) for the respondents.

Their Lordships took time for consideration.
7 December 2000. The following opinions were delivered.

LORD SLYNN OF HADLEY.

My Lords, Council Directive (EC) 98/43 (OJ 1998 L213 p 9) of the European Parliament and the Council dated 6 July 1998 provided, subject to specified qualifications, that all forms of advertising or sponsorship with the aim or the direct or indirect effect of promoting a tobacco product shall be banned in the Community.

The directive, made having regard to arts 57(2), 66 and 100a of the EEC Treaty (now arts 47(2), 55 and 95 EC), recited that there existed differences between the laws and administrative provisions of the member states in relation to such advertising and sponsorship which—

> 'transcend the borders of the Member States and the differences in question are likely to give rise to barriers to the movement between Member States of the products which serve as the media for such advertising and sponsorship and to freedom to provide services in this area, as well as distort competition, thereby impeding the functioning of the internal market …'

Accordingly these barriers should be removed and the laws of member states be approximated. The directive further recited that—

> 'in accordance with Article 100a(3) of the Treaty, the Commission is obliged, in its proposals under paragraph 1 concerning health, safety, environmental protection and consumer protection, to take as a base a high level of protection.'

The directive came into force on 30 July 1998 but it provided in art 6 that 'Member

States shall bring into force laws, regulations, and administrative provisions necessary to comply with this Directive not later than 30 July 2001' but:

> 'In exceptional cases and for duly justified reasons, Member States may continue to authorise the existing sponsorship of events or activities organised at world level for a further period of three years ending not later than 1 October 2006 …'

The United Kingdom government had already announced on 14 May 1997 in the Queen's speech that it would be adopting measures, including legislation, to ban tobacco advertising. On 10 December 1998 the government published a White Paper, Smoking Kills (Cm 4177) and it subsequently published proposed regulations to give effect to the directive with effect from 10 December 1999.

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The Community directive was controversial. Germany brought proceedings against the European Parliament and the Council challenging its validity and the four tobacco companies (the appellants) on 30 November 1998 applied for judicial review of the Secretary of State's decision to implement the directive. Turner J having granted leave to apply for judicial review on 16 December 1998, on 2 February 1999 ordered a reference to the Court of Justice of the European Communities under art 177 of the EEC Treaty (now art 234 EC). On 29 October 1999 he granted an injunction restraining the Secretary of State from making regulations under s 2 of the European Communities Act 1972 in order to implement the directive, such injunction to continue until the Court of Justice determined the validity of the directive on the reference.

There was an immediate appeal with the leave of the judge and on 16 December 1999 the Court of Appeal by a majority (Lord Woolf MR and Ward LJ; Laws LJ dissenting) set aside the injunction ([2000] 1 All ER 572, [2000] 2 WLR 834). The majority, whilst accepting that there were serious doubts as to the directive's validity, considered that the grant of interim relief had to be decided in accordance with Community law principles. The latter involved the applicant showing that serious and irreparable damage would result and for that purpose financial damage could not in principle be regarded as irreparable. The majority also considered that to grant an injunction would usurp the political judgment involved in the government's decision to promote public health.

When the appeal was opened before your Lordships' House, Mr Sumption QC on behalf of the tobacco companies, put forward forceful arguments that the directive was invalid on the basis that it had nothing to do with the internal market or the protection of competition, but was purely a measure to protect public health which was plainly outside the powers conferred on the institutions by the Treaty. It emerged however that the Advocate General's opinion in the reference was due to be given on 15 June 2000 and it was agreed that the hearing should be adjourned. The Advocate General concluded that the directive was ultra vires and the Secretary of State accepted that a national regulation should not be made pending the decision of the Court of Justice and that the tobacco companies should have their costs limited to two counsel. Subsequently on 5 October 2000 the Court of Justice held that the directive was ultra vires (see Germany v European Parliament Joined cases C-376/98 and C-74/99 [2000] All ER (EC) 769). It is

in those circumstances unnecessary for your Lordships to consider that question.

The appellants however ask that the House should rule on the question whether it was right in this case to grant interim relief and in particular whether the test for a national judge to consider whether to grant an injunction is that applicable only under domestic law (as the appellants contend) or whether the test under Community law is to be applied and if so whether and to what extent it is different from that under domestic law.

If the grant of the injunction was to depend wholly on domestic law the principle laid down in eg American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, [1975] AC 396 and in Factortame Ltd v Secretary of State for Transport (No 2) Case C-213/89 [1991] 1 All ER 70, [1991] 1 AC 603 are to be followed. But the essential question is whether domestic law only is relevant or whether Community law has any application. That, it seems to me plainly, involves a question of Community law. The granting of interim relief has already been considered a number of times by the Court of Justice. Thus in the Factortame (No 2) case the Court of Justice held that in a case concerning Community law where interim relief was

sought, if a national court considered that the only obstacle which precluded it from granting such relief was a rule of national law it had to set that rule aside.

There the challenge was to domestic legislation which was said to be contrary to Community law. The Court of Justice did not give guidance as to the principles to be followed by a judge in considering whether to grant interim relief. In that case on the question posed it was not necessary to do so. The House of Lords in considering whether interim relief should be granted, applied the principles in the American Cyanamid case.

In Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe Joined cases C-143/88 and C-92/89 [1991] ECR I-415 the court was specifically asked to say 'under what conditions national courts may order the suspension of enforcement of a national administrative measure based on a Community regulation'.

The Court of Justice recognised that judges must follow rules of procedure determined by national law. At the same time it stressed (at 542 (paras 25–26)) as it has consistently done, that the 'uniform application [of Community law] is a fundamental requirement of the Community legal order'.

It followed that even applying national procedural rules the question of whether or not to suspend the enforcement of administrative measures should be considered in all member states, 'subject, at the very least, to conditions which are uniform so far as the granting of such relief is concerned'. Thus national judges should only grant relief upon the conditions on which the Court of Justice itself would grant relief under art 185 in the context of actions brought under art 183 of the EEC Treaty (now arts 242 and 240 EC).

It seems to me now as it seemed to me in the Zuckerfabrik case that unless judges throughout the Community follow recognised conditions for the grant of interim relief, the review of national regulations applying Community law is going to vary widely. This is plainly wrong. There should be a Community-wide approach to the application, even

via national regulations, of Community law. It is obvious that the over-ready granting of interim injunctive relief could undermine such application. National judges therefore needed to be told of the conditions to be satisfied if inconsistent and unjustified injunctive relief was to be avoided.

Neither the Factortame (No 2) case nor the Zuckerfabrik case dealt expressly with the present situation which is not concerned with national legislation already in force and whose validity depends on Community law, but with the control of a member state's power to adopt national regulations giving effect to a Community directive whose validity is challenged. Clearly prima facie the state has a duty to give effect to the directive within the time laid down and not to take steps which are liable seriously to compromise the result prescribed by the directive to be achieved by the end of that period (see Inter-Environnement Wallonie ASBL v Région Wallonie Case C-129/96 [1998] All ER (EC) 155, [1997] ECR I-7411). This is an obligation laid on all member states equally where a regulation is made or, as here, where the directive is addressed to all the member states (art 249 EC, ex art 189). It seems to me that that uniformity which is 'a fundamental requirement of the Community legal order' is no less necessary here than in the Zuckerfabrik situation. What states may do in adopting or refusing to adopt Community directives for policy reasons is one thing; what courts should do in enforcing and applying Community law is another. At the least there should be a consistency of approach, whatever flexibility a judge may have in applying that approach (see EC Commission (CLECAT intervening) v Atlantic Container Line AB (EC Shipowners' Associations ASBL intervening) Case C-149/95 P(R) [1995] All ER (EC) 853, [1995] ECR I-2165). It seems

to me highly undesirable that the question whether different governments should be restrained even temporarily from giving effect to a directive, should be considered on wholly different tests in different national courts.

I think it is at the least arguable that if a directive is implemented in national law before the prescribed final date, any application for interim relief to suspend the operation of the directive would be a matter for Community law, and that the position should be the same on an application for interim relief to prevent the directive being adopted.

I do not however exclude the possibility, if such Community test is satisfied, of a court granting interim relief against a national government, even though on the basis of Foto-Frost v Hauptzollamt Lübeck-Ost Case 314/85 [1987] ECR 4199 it is only the Court of Justice which can declare the directive invalid.

It seems to me, therefore, that Community law is a relevant factor or at least that it is not clear beyond doubt that it is not a relevant factor and that as a starting point the conditions referred to in the Zuckerfabrik case (as followed in Atlanta Fruchthandelgesellschaft mbH v Bundesamt für Ernährung und Forstwirtschaft Case C-465/93 [1996] All ER (EC) 31, [1995] ECR I-3761) should be applied. It is not necessary to set them out. How far there is a difference between those conditions and the American Cyanamid case has been much debated before your Lordships. In many respects it seems to me that the tests overlap—urgency, the need to avoid serious and irreparable damage to the applicant, serious grounds to consider that the legislation is

invalid—but there may be differences eg as to how far financial damage can be taken into account. In respect of this the court said in the Zuckerfabrik case ([1991] ECR I-415 at 543 (para 29)) that financial damage cannot 'be regarded in principle as irreparable' but it went on:

> 'However, it is for the national court hearing the application for interim relief to examine the circumstances particular to the case before it. It must in this connection consider whether immediate enforcement of the measure which is the subject of the application for interim relief would be likely to result in irreversible damage to the applicant which could not be made good if the Community act were to be declared invalid.'

The Zuckerfabrik case was the first case in which the court gave such an indication of the principles to be applied but Community law develops and is refined as different situations are presented to the court. The Zuckerfabrik case is not necessarily the last word on the subject any more than Francovich v Italy Joined cases C-6/90 and C-9/90 [1991] ECR I-5357 could ever have been regarded as the last word on when damages against a state for breach of a Community obligation could be awarded.

I am therefore firmly of the view that if in order to give judgment in this appeal it had been necessary to consider; (a) whether Community law applied, and (b) what was the scope of its application in the present case, it would have been necessary and obligatory for your Lordships to refer a question to the Court of Justice under art 234 of the EC Treaty.

It is, however, not necessary to decide either question in order to give judgment on this appeal so that the reference procedure is not available. Any regret that this question should be left open is reduced, at least, by the consideration that on an application of this kind the full circumstances have to be taken into account.

I would accordingly make no order on the appeal save that the appellants should have their costs in the Court of Appeal and before your Lordships' House

limited to two counsel in accordance with the general practice. I am not persuaded that this is a case justifying an exceptional order for three counsel.

LORD NICHOLLS OF BIRKENHEAD.

My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Slynn of Hadley and Lord Hoffmann. Lord Hoffmann is of the view that, where the validity of a directive is challenged before the date prescribed for its implementation, Community law is inapplicable on an application to a national court for interim relief. There is force in his reasoning, but I am not persuaded this can be regarded as acte claire. A directive has immediate legal effect according to its tenor. Hence, Community law does not require uniform application of the directive before the implementation date. During the prescribed implementation period member states are not in breach by failing to transpose the directive into national law. Thus, an order by a

national court suspending reliance on an impugned directive during the implementation period does not put a member state in breach of its obligations under Community law. In the sense, therefore, of absence of breach of the directive, Community legal order is not affected if a member state, through its courts or any other of its institutions, delays implementation within the implementation period. But in another, broader, sense Community legal order is affected, or may be regarded as affected, by such a suspension, because the decision of the national court does interfere with the operation of the directive in a member state during the implementation period. The court order precludes the operation of the directive as a valid directive.

I have found myself compelled therefore to reach the same conclusion as Lord Slynn. Had it been necessary to give judgment on this appeal, it would have been necessary for the House to refer a question to the Court of Justice of the European Communities. I have reached this conclusion with reluctance, because it means that the present appeal will not provide the answer to an important question of law. The question will have to remain open for another occasion. This is an unsatisfactory outcome in a case where an interlocutory application has come as far as this House. But, as matters have turned out, I see no escape from this conclusion.

LORD HOFFMANN.

My Lords, in December 1998 the government published a White Paper, Smoking Kills (Cm 4177) in which it announced its intention to bring forward secondary legislation in the 1998–1999 Parliamentary session to implement Council Directive (EC) 98/43 (OJ 1998 L213 p 9) 'on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising or sponsorship of tobacco products'. The power under which it proposed to legislate was that conferred by s 2(2) of the European Communities Act 1972:

> '(2) … Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision—(a) for the purpose of implementing any Community obligation of the United Kingdom …'

The Act defines a 'Community obligation' in Sch 1 as 'any obligation created or arising by or under the Treaties, whether an enforceable Community obligation or not'.

By art 189 of the EEC Treaty (now art 249 EC), a directive is 'binding as to the result to be achieved' upon each member state. The objective stated by the directive in art 1 was to 'approximate the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of

tobacco products'. The form of approximation required by the directive was, by art 3, that all forms of advertising and sponsorship should be banned. By art 6, member states were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive not later than 30 July 2001.

Prima facie therefore, the directive gave rise to a Community obligation which the Secretary of State was entitled to make regulations under s 2(2) of the Act to implement. By art 191 of the EEC Treaty (now art 254 EC), a directive enters into force on the date which it specifies. Article 8 of the directive said that this was to be the date of its publication in the Official Journal. That happened on 30 July 1998. The duty to implement a directive comes into existence when it enters into force although it does not become enforceable until the implementation date. The Community obligation is, so to speak, debitum in praesenti, solvendum in futuro. Meanwhile, however, the directive is not without practical effect in Community law. In Inter-Environnement Wallonie ASBL v Région Wallonie Case C-129/96 [1998] All ER (EC) 155, [1997] ECR I-7411 at 7499 (paras 43–45) the Court of Justice of the European Communities said that although member states 'cannot be faulted for not having transposed the directive into their internal legal order before expiry of [the implementation period]', they were obliged during that period to 'refrain from taking any measures liable seriously to compromise the result prescribed'. And of course as a matter of United Kingdom domestic law, the 'Community obligation' which creates the power to make regulations under s 2(2) of the Act comes into existence immediately the directive enters into force. The definition in Sch 1 to that Act specifically provides that the obligation need not be enforceable.

The appellants, who are four tobacco companies, challenge the exercise of the power on the grounds that the directive is invalid and that no Community obligation therefore exists at all. The basis for the challenge is that the directive is ultra vires the powers conferred upon the Community institutions by the treaty. It purported to be made pursuant to art 100a (now art 95 EC). This gives the Council power to adopt measures 'which have as their object the establishment and functioning of the internal market'. The directive recites that its object is to eliminate barriers between member states in the provision of services in connection with tobacco advertising and sponsorship and the movement of products which serve as media for such advertising and sponsorship. The appellants say, putting the matter shortly, that the internal market in the provision of services in connection with tobacco advertising and sponsorship cannot be made more efficient by a total prohibition on those activities

The appellants therefore commenced judicial review proceedings in which they claimed a declaration that the directive was invalid and requested a reference to the Court of Justice. On 2 February 1999 Turner J made an order requesting a preliminary ruling. In June 1999 the government published draft regulations to implement the directive and, after a period of consultation, announced its final proposals on 11 October 1999. On the same day the appellants gave notice of an application to Turner J for an order that the decision to implement the regulations should be stayed pending the preliminary ruling of the Court of Justice, which was expected in late 2000 or early 2001. On 29 October 1999 the judge granted the order. He directed himself in the exercise of his discretion by the principles laid down by the House of Lords in American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, [1975] AC 396 as applied to the peculiar problems of restraining the enforcement of legislation by the decision of the House in Factortame Ltd v Secretary of State for Transport (No 2) Case C-213/89 [1991] 1 All ER 70, [1991] 1 AC 603. He concluded

that the appellants had a strong case on the merits and that damages would not be an

adequate remedy either for them or the Secretary of State. He made a careful examination of the various factors relevant to the balance of convenience and said that it came down firmly in favour of the grant of interlocutory relief.

The Court of Appeal, by a majority (Lord Woolf MR and Ward LJ; Laws LJ dissenting) allowed an appeal and discharged the injunction ([2000] 1 All ER 572, [2000] 2 WLR 834). They said that the judge had been wrong to exercise his discretion according to the relevant principles of English law. He should have applied the principles of Community law laid down by the Court of Justice in Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe Joined cases C-143/88 and C-92/89 [1991] ECR I-415. These principles were to be applied by all member states in applications to suspend the enforcement of national measures based on Community legislation. The Court of Appeal said that they imposed a more demanding standard than English domestic law. The applicant had to demonstrate that he had a strong case on the merits and that, in the absence of interlocutory relief, he would suffer irreparable damage. For this purpose, 'purely financial damage' was deemed not to be irreparable merely because damages would not be an adequate remedy. The applicant had to show that it would be 'placed in a situation which could endanger its very existence or irremediably affect its market share': Pfizer Animal Health SA/NA v EC Council Case T-13/99 R [1999] 3 CMLR 79 at 114 (para 138). The majority held that the appellants had failed to satisfy this condition.

Laws LJ said that the principles in the Zuckerfabrik case had no application. The question of whether the directive should be implemented sooner or later within the implementation period was entirely a matter for the United Kingdom to decide. Therefore the question of whether a United Kingdom court should restrain implementation within that period in the interests of justice was a matter for domestic law. It followed that there were no grounds for interfering with the exercise of discretion by Turner J.

The appellants appealed to your Lordships' House. The position of counsel for the Secretary of State (Mr Vajda QC) was that on the merits the appellants had an arguable case but no more. Mr Sumption QC for the appellants argued that the case was a very strong one. He also submitted that Turner J was right in deciding the question according to English law and that, in any case, the criteria in the Zuckerfabrik case, when properly examined, were no different from those applied by Turner J. In particular, there was no European doctrine that financial damage was deemed not to be irreparable even if it was not capable of being repaired.

The oral hearing in the reference which Turner J had made in February 1999, together with conjoined proceedings brought by the Federal Republic of Germany to annul the directive, took place on 12 April 2000. On 15 June 2000, after the conclusion of argument before your Lordships, Advocate General Fennelly issued his opinion. He expressed the firm view that the directive was invalid for a number of reasons, including ultra vires on the grounds for which the appellants contended. In view of this turn of events, the Secretary of State offered an undertaking in substantially the form of interlocutory relief sought by the appellants. He also made an offer to pay the appellants' costs, limited to two counsel instead of the three actually employed. In view of this offer, the Secretary of State submitted that the proceedings had become moot and that your Lordships should accept the undertakings and make no order or express any views on the

matters debated at the Bar. Since then, the Court of Justice has annulled the directive and the power to make regulations under s 2(2) of the Act

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has disappeared (see Germany v European Parliament Joined cases C-376/98 and C-74/99 [2000] All ER (EC) 769). Even the undertakings are therefore no longer needed.

Mr Sumption on the other hand said that as the appeal was properly before the House, it had jurisdiction to give a judgment if it considered that there were good reasons in the public interest for doing so (see R v Secretary of State for the Home Dept, ex p Salem [1999] 2 All ER 42 at 47, [1999] 1 AC 450 at 456–457). In the present case, the important question as to whether the decision to grant interlocutory relief should have been decided according to English or Community law divided the Court of Appeal and was fully argued before your Lordships. Mr Sumption submits that if your Lordships consider that the majority of the Court of Appeal were wrong, you should say so. Their judgment should not be left to stand as authority, leaving some future litigants to bear the trouble and expense of bringing the matter once more before your Lordships' House.

My Lords, I have formed the clear view that upon the principal matter in dispute the decisions of Turner J and Laws LJ were right and that it would not be in the interests of justice to leave the point to be argued in a later appeal. I can see the advantages to the Secretary of State in facing future litigants with the prospect of having to bring the matter before your Lordships in order to have the authority of the Court of Appeal's decision overturned. But I do not think that this would be fair.

In order to decide whether the court was required by Community law to apply the principles stated in the Zuckerfabrik case, it is necessary to examine the reasoning of the Court of Justice in that case. It concerned a Council regulation forming part of the common agricultural policy which imposed various levies on sugar manufacturers. The customs office at Itzehoe in Schleswig-Holstein made a decision that Zuckerfabrik Süderdithmarschen (Zuckerfabrik), a sugar manufacturer, was liable to pay about DM2m as 'special elimination levy' pursuant to the regulation. Zuckerfabrik claimed that the regulation was invalid and applied to the Revenue Court in Hamburg for an interlocutory order suspending enforcement of the customs office order pending a preliminary ruling by the Court of Justice. The court also referred the questions of whether it had jurisdiction to make such an interlocutory order and the conditions upon which it could do so. In particular, it asked whether a uniform Community criterion existed or whether the matter should be decided according to national law.

There is no doubt that the regulation, if valid, was immediately and directly applicable in Germany. The decision of the customs office were merely an administrative order giving effect to the requirements of the regulation. The Court of Justice said that justice required national courts to have jurisdiction to suspend the enforcement of a Community regulation pending a decision on its validity. The right of individuals in member states to challenge the validity of Community regulations would be compromised if—

> 'pending delivery of a judgment of the Court, which alone has jurisdiction to declare that a Community regulation is invalid (see judgment in Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost ([1987] ECR 4199 at 4232

(para 20))), individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of enforcement which would make it possible for the effects of the disputed regulation to be rendered for the time being inoperative as regards them.' (See [1991] ECR I-415 at 541 (para 17).)

The court then went on to consider what conditions should be satisfied, and in particular, whether those conditions should be left to national law or be uniform throughout the Community. It decided on uniformity and it is important to note the reason. The court said ([1991] ECR I-415 at 542 (paras 25–26)) that otherwise, differences in the criteria applied by national courts 'may jeopardise the uniform application of Community law … Such uniform application is a fundamental requirement of the Community legal order'. The obligation of the national courts to adopt uniform criteria is thus one facet of the general obligation of a member state, as expressed for example in art 5 (now art 10 EC), to take all appropriate measures 'to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community'.

The court went on to say that the criteria applied by a national court should be the same as those applied by the Court of Justice in exercising its power under art 185 (now art 242 EC) to suspend the operation of a contested Community act in actions to annul such acts brought before the court itself under art 173 (now art 230 EC).

The question is therefore whether the reasoning in the Zuckerfabrik case can be extrapolated from the case in which it is sought to suspend the enforcement of a Community regulation which is prima facie enforceable to the case in which it is sought to suspend national legislation made to implement a directive which is not yet enforceable. Is there the same need for uniform criteria? This must in my opinion depend upon whether, in such a situation, differences in national criteria would jeopardise the uniform application of Community law.

In my view it is obvious that during the implementation period, differences in national criteria for the grant of interlocutory relief cannot jeopardise the uniform application of Community law. This is because Community law does not require uniform implementation of the directive before the implementation date. The member state has only the negative obligation stated in Inter-Environnement Wallonie ASBL v Région Wallonie Case C-129/96 [1998] All ER (EC) 155 at 177, [1997] ECR I-7411 at 7449 (para 45), to 'refrain from taking any measures liable seriously to compromise the result prescribed'. It is not disputed that the executive or legislative branches of government of a member state can delay the implementation of a directive until the end of the implementation period for any reasons of politics or expedience which they think fit. No one suggests that this would be a breach of their obligations under art 5 or jeopardise the uniform application of Community law. To object to the judicial branch of government delaying implementation on the narrow ground that, according to national criteria, the interests of justice so require, seems to me to swallow a camel and strain at a gnat.

The argument for the Secretary of State comes to saying that Community law requires the judiciary of a member state to defer to the executive on the question of when the directive should be implemented. Once the executive had decided that the directive

should be implemented, the judiciary comes under a Community law obligation to co-operate and should behave as if the directive were already enforceable. In this way it is argued that enforcement can be suspended only if the Zuckerfabrik criteria are satisfied.

In my opinion this argument is mistaken. There is no authority for the proposition that Community law is concerned with the relations between the different branches of government of a member state. On the contrary, Community law is indifferent to the internal arrangements of power within a member state. The obligations of Community law are imposed on all the organs of government of the member state. It is in accordance with this principle that the duty of a member

state to give effect to a directive applies not only to its legislature or executive, which would, under the national constitution, ordinarily have the power to take the necessary measures, but also to its judiciary. This is the basis of the famous principle in Marleasing SA v La Comercial Internacional de Alimentación SA Case C-106/89 [1990] ECR I-4135 at 4159 (para 8):

> '… the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.'

Contrariwise, if a member state is not under a duty to implement a directive, then no such duty is binding upon any of the authorities of that member state. As a matter of domestic English law, the fact that the Secretary of State has decided to exercise the power to make the regulations is something to be taken into account in weighing the public interest element to be put into the scale of the balance of convenience. It is he who is prima facie entrusted by s 2(2) of the Act with the duty of deciding when the public interest requires the regulations to be made. A similar point was discussed in F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry [1974] 2 All ER 1128, [1975] AC 295. But Community law has nothing to say on the matter.

My Lords, I turn now to examine the contrary arguments advanced by the majority of the Court of Appeal. They are conveniently listed in the judgment of Ward LJ.

(1) The application for interlocutory relief is based upon the proposition that the directive is invalid in Community law. It is therefore inconsistent for the appellants to claim that their application should be determined according to principles of English law. This is put forward without reference to any rule or policy of Community law but as a straightforward matter of syllogistic logic. In my opinion it is fallacious. The appellants challenge the proposed regulations as ultra vires the powers conferred by the Act. That

challenge raises a question of European law only because s 2(2) of the Act makes the validity of the regulations dependent upon the existence of a Community obligation. So one of the factors which must be considered in deciding whether to grant interlocutory relief is an assessment of the likelihood that the Court of Justice will hold that the directive is invalid and that no Community obligation exists. But there is nothing unusual about interlocutory relief depending upon an assessment of the likelihood that something will happen. The fact that the event in question is a decision of the Court of Justice does not in itself convert the question of whether to grant interlocutory relief into a question of European law. If, for example, a litigant bringing proceedings in Germany applies for ancillary relief in England (a freezing order, for example) the court will have to form a view on his chances of success in the German court according to German law. But that does not mean that the question of whether to grant interlocutory relief must be decided according to German law.

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(2) The ultimate objective of the proceedings is to have the directive declared invalid and this is a matter of Community law. Therefore the case is 'redolent of European law'. This is the same argument as I have just rejected. Redolence is too vague a criterion for making a choice of law.

(3) The outcome should not turn upon whether the regulations had been made before the judicial review proceedings were commenced. In general, I would agree, although the fact that the regulations have been brought into force may be a factor which affects the balance of convenience. But that has nothing to do with the question of whether the matter should be decided according to principles of Community or domestic law.

(4) If the Court of Justice, which is seised of the matter, were to be asked to grant interim relief, it would do so according to principles of Community law. Therefore a national court considering the same question should also do so. This is in my opinion a false analogy because it is not comparing like with like. The appellants would have no locus standi to ask the Court of Justice for an interim order suspending the operation of the directive in Community law. Nor do they need to do so. They are perfectly satisfied with the present interim position under which the directive does not become enforceable in Community law until 30 July 2001. What they want is an interim order suspending the operation of the domestic regulations. The Court of Justice has no jurisdiction to grant such an order. The enforcement of the regulations are a matter for national law which, as Advocate General Fennelly put it, raises only collaterally the validity of the directive (Germany v European Parliament Joined cases C-376/98 and C-74/99 [2000] All ER (EC) 769 at 787–788 (para 33) of his opinion). The suspension of the enforcement of the directive and the suspension of the enforcement of the regulations in the period before the directive become enforceable are altogether different questions.

(5) The directive empowers the government to implement the directive at any time before the implementation date. An injunction would fetter a right granted to the government by European law and therefore affects the European interest. This in my opinion is also fallacious. The directive confers no powers upon the government. All that it does is to impose obligations upon the United Kingdom as a member state. The powers of the executive branch of government of the United Kingdom are entirely a matter of domestic law. It is s 2(2) of the Act which confers legislative power upon Her Majesty in

Council and the Secretary of State. There is no need, as a matter of Community law, for the executive to avail itself of s 2(2) or for s 2(2) to exist. The legislative branch of government could discharge the Community obligations of the United Kingdom by enacting primary legislation. The fact that the government has power to do so under s 2(2) is a matter of domestic convenience. Parliament has chosen to make this power conditional upon the existence of a Community obligation and it is for this reason only that the validity of the directive is collaterally involved.

(6) The Zuckerfabrik case does not suggest that the test differs according to whether or not the regulations have already been enacted. I agree. This is the same as point (3). But it does not affect the question of whether, either before or after the enactment of the regulations, but before the implementation date, the question should be decided according to English or Community law.

The reasons given by Lord Woolf MR were substantially the same.

My Lords, for the reasons I have given above, I think that with all respect to the contrary views of the majority of the Court of Appeal it is plain and obvious, acte claire, that European law does not apply to the question of whether Turner J

should have granted the order which he did. European law was involved in the case only by virtue of a renvoi from s 2(2) of the Act and not in its own right. In the circumstances it is unnecessary for me to express any view upon whether the Zuckerfabrik criteria are different from those which are applied in English domestic law. If the question had been necessary for your Lordships' decision, I would have proposed that it be referred to the Court of Justice.

At conclusion of the argument I would have allowed the appeal and restored the order of Turner J. In the events which have happened, it is unnecessary to do more than propose that your Lordships make no order other than to order that the Secretary of State pay the appellants' costs in this House and the Court of Appeal.

LORD CLYDE.

My Lords, at the close of the argument in this appeal I believed that a confident answer could be safely returned to the question whether English law or Community law should apply in the granting of an injunction against the making of the regulations in this case. My inclination was to hold that this was a matter purely of national law and that the conditions for relief should be those established under English law. However, having had the advantage of reading the speech which has been prepared by my noble and learned friend Lord Slynn of Hadley and having reconsidered in particular the observations of the Court of Justice of the European Communities in Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe Joined cases C-143/88 and C-92/89 [1991] ECR I-415, I have come to the conclusion that the point is not so clear that it can be properly resolved without the guidance of the Court of Justice. While I share the regrets which have been expressed at leaving the matter without a final determination, I am persuaded that the present situation is one where a reference would be proper, particularly where the point

is plainly open to serious differences of view.

I agree that an order should be made in the terms proposed by Lord Slynn.

LORD MILLETT.

My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. I agree both with his conclusion and with his reasons for giving them. I wish, however, to add some observations of my own in regard to two matters.

The first is a matter of Community law. I share the concern expressed by my noble and learned friend Lord Nicholls of Birkenhead that the national court should not interfere with the operation of a directive during the implementation period. Where I respectfully differ from him is that I do not consider that it does so by making an order which allows the directive to be implemented in full by the end of that period. Moreover I believe that this much is acte claire.

I do not consider that the question which troubles Lord Nicholls can be answered in the abstract. It can only be answered by reference to a particular order which the national court proposes to make. The Court of Justice of the European Communities cannot sensibly decide whether a member state is proposing to act inconsistently with the Community legal order unless it knows what it is that the member state is proposing to do or refrain from doing. If it is told that the member state proposes to implement the directive in full before the end of the implementation period save only in so far as it is prevented from doing so by an order of its national court, the Court of Justice will need to see the order. In my view compliance with the Community legal order requires the national court to refrain from placing any obstacle in the way of full implementation of the directive by the end of the implementation period, but it does no more than this.

The best way of satisfying this requirement is for the national court to ensure that its order does not interfere with the power of the national authorities during the implementation period to take all such steps as may be necessary to implement the directive short of actually bringing it into force before the end of that period.

The second is a matter of our own domestic law. I wish to express my profound disagreement with some of the observations made by the Court of Appeal in regard to what they saw as an impermissible attempt to interfere with the government's legislative programme. This raised an important constitutional issue concerning the relationship between the executive and the judiciary. The relevant constitutional doctrine is encapsulated in a passage from Dworkin's Law's Empire (1998) p 9:

> 'The Rule of Law requires that State coercion shall always be backed by law. The State's force must not be used or withheld, no matter how useful that would be to the ends in view, no matter how beneficial those ends, except as licensed or required by law—i.e. by valid legislation or

decisions of the Courts having the effect of making law.'

It is the responsibility of the judges to ensure that this principle is observed and to inquire into the validity of any law which is invoked by the state to support its actions.

I agree with the order which is proposed.

No order made on appeal save as to costs.
[2001] 1 All ER 850 at 865