

JUDGMENT OF THE COURT

14 December 1989 \*

In Case C-3/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice of England and Wales for a preliminary ruling in the proceedings pending before that court between

**The Queen**

and

**Ministry of Agriculture, Fisheries and Food, ex parte Ageate Ltd,**

on the interpretation of the provisions of Community law concerning in particular the free movement of workers and fishing and of Articles 55 and 56 of the Act concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Communities of 1985 (Official Journal 1985, L 302, p. 23) in order to determine whether the conditions which the crews of fishing vessels flying the British flag must satisfy under national legislation are compatible with Community law,

THE COURT

composed of: O. Due, President, Sir Gordon Slynn, C. N. Kakouris and F. A. Schockweiler (Presidents of Chambers), T. Koopmans, G. F. Mancini, R. Joliet, T. F. O'Higgins, G. C. Rodríguez Iglesias, F. Grévisse and M. Díez de Velasco, Judges,

Advocate General: J. Mischo

Registrar: H. A. Rühl, Principal Administrator

\* Language of the case English

after considering the observations submitted on behalf of

Agegate Ltd, by David Vaughan QC and K. P. E. Lasok and G. Barling, barristers, and by S. J. Swabey, solicitor, of Thomas Cooper & Stibbard, in the written procedure, and by David Vaughan QC and G. Barling, barrister, at the hearing,

the United Kingdom, by H. R. L. Purse, of the Treasury Solicitor's Department, acting as Agent, assisted by J. Laws and C. Vajda, barristers, in the written procedure, and by T. J. G. Pratt, acting as Agent, assisted by C. Bellamy QC and C. Vajda, barrister, at the hearing,

Ireland, by L. J. Dockery, Chief State Solicitor, acting as Agent, assisted by James O'Reilly, barrister-at-Law,

the Italian Government, by O. Fiumara, avvocato dello Stato, acting as Agent,

the Kingdom of Spain, by F. J. Conde de Saro, Director-General for coordination in matters involving Community law and institutions, and by R. Silva de Lapuerta, abogado del Estado, acting as Agents,

the Commission of the European Communities, by P. Oliver and J. Currall, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 26 October 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 18 November 1988,

gives the following

## Judgment

1 By order of 1 December 1986, which was received at the Court on 12 January 1987, the High Court of Justice of England and Wales referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of the provisions of Community law concerning in particular the free movement of workers and fishing and of Articles 55 and 56 of the Act concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Communities of 1985 (Official Journal 1985, L 302, p. 23, hereinafter referred to as 'the 1985 Act of Accession').

2 Those questions were raised in proceedings between the Ministry of Agriculture, Fisheries and Food and Agegate Ltd, a company incorporated in the United Kingdom and controlled for the most part by Spanish interests (hereinafter referred to as 'the applicant in the main proceedings').

### The United Kingdom's legislation and practice with regard to fishing

3 Under the Sea Fish (Conservation) Act 1967, as amended by the Fishery Limits Act 1976 and the Fisheries Act 1981, fishing vessels registered in the United Kingdom must have a fishing licence. That legislation has been supplemented by the British Fishing Boats Act 1983, the British Fishing Boats Order 1983 and the Sea Fish Licensing Order 1983.

4 The fishing licences granted pursuant to that legislation by the United Kingdom authorities as from 1 January 1986 determined the fishing area and species of fish covered by the licences and stated the conditions which had to be fulfilled cumulatively at all times, failing which the licences would be revoked. The purpose of those conditions was to ensure that fishing vessels had a 'real economic link' with the United Kingdom. Those conditions concern, first, the operation of the vessel for which the licence was granted and, secondly, its crew.

5 The conditions relating to the crew of the fishing vessel were worded as follows:

- '(i) At least 75% of the crew must be British citizens, or EEC nationals (excluding until 1 January 1988, any Greek nationals and, until 1 January 1993 any Spanish or Portuguese nationals who are not the spouse or child under 21 of Greek, Spanish or Portuguese workers already installed in the United Kingdom in accordance with the transitional arrangements on the free movement of workers following the accession of Greece, Spain and Portugal to the Communities as provided for in the relevant Accession Treaties) ordinarily resident in the United Kingdom, Isle of Man or Channel Islands; residence means residence on shore and for this purpose service aboard a British ship does not count as residence in the United Kingdom, Isle of Man or Channel Islands.
- (ii) The skipper and all the crew must be making contributions to United Kingdom National Insurance, or equivalent Isle of Man or Channel Islands schemes: this would include Class 1, Special Mariners', Class 2 or Class 4 self-employed contributions.'

### **The main proceedings**

6 According to the documents before the Court, the applicant in the main proceedings is the owner of a fishing vessel called the *Ama Antxine*, which is registered in the United Kingdom and flies the British flag. The crew of the vessel is partly composed of Spanish share fishermen, that is to say fishermen who are remunerated by a share of the proceeds of sale of their catches.

7 On 23 January 1986 the applicant in the main proceedings obtained a series of new licences for the *Ama Antxine*. The licences stipulated the conditions mentioned above.

8 Considering that the conditions relating to the crew of the fishing vessel were, *inter alia*, contrary to Community law, the applicant applied to the High Court of Justice of England and Wales for judicial review of the licences containing those conditions.

9 In order to resolve the dispute concerning the conditions relating to the crew the High Court referred the following questions to the Court of Justice for a preliminary ruling:

‘A — In deciding whether in Community law a share fisherman is a provider of services or a worker, what are the relevant tests to be applied?

B — Can a Member State, in granting, after the accession of Spain and Portugal to the European Communities, a licence to the owner or charterer of a fishing vessel flying the flag and registered in that Member State, rely on Articles 55 and 56 of the Act of Accession of Spain and Portugal to the European Communities (which apply only to workers) and require that:

- (i) 75% of the crew of a fishing vessel registered in that Member State flying its flag be EEC nationals resident on shore in that Member State but excluding until 1 January 1993 any Spanish nationals who are not the spouses or children under 21 of Spanish workers already installed in the Member State issuing the licence;

and that

- (ii) the skipper and all the crew must be making contributions to the social security scheme of that Member State?

C — In any event, is the grant of a licence by a Member State after the accession of Spain and Portugal to the European Communities to the owner or charterer of a fishing vessel registered in that Member State and flying its flag which is subject to the following conditions:

(i) the condition that at least 75% of the crew must be

1. nationals of the Member State issuing the licence or EEC nationals (but excluding until 1 January 1993 any Spanish nationals who are not the spouse or children under 21 of Spanish workers already installed in the Member State issuing the licence in accordance with the transitional arrangements on the free movement of workers following the accession of Spain to the Communities provided for in the Treaty of Accession) and

2. ordinarily resident in the Member State issuing the licence (residence meaning residence on shore not including service aboard a ship of that Member State);

(ii) the condition that the skipper and all the crew must be making contributions to the social security scheme of the Member State issuing the licence,

compatible with Community law including the common fisheries policy?

D — Can the holder of such a licence rely, in proceedings before a national court, on the incompatibility with Community law of one or other or both of the conditions referred to in Question 3, for the purpose of establishing that the imposition of such conditions or either of them is unlawful and should be quashed?

<sup>10</sup> Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

- 11 It is apparent from the documents before the Court that the main proceedings relate in substance to the conditions which may be imposed on British vessels fishing against the quotas which the Community allocates to the United Kingdom. Leaving aside the question whether such conditions are in conformity with Community law in relation to fishing that is not subject to quotas, it is therefore appropriate, before drawing up a list of the points raised by the preliminary questions and examining those points, to review the principal features of the rules relating to fishing quotas in the general context of the Community rules relating to fishing.
- 12 The Community rules establish the principle of equal conditions of access to fishery resources for any fishing vessel flying the flag of, or registered in, a Member State (Article 2(1) of Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry, Official Journal 1976, L 20, p. 19), except with regard to the area encompassed by the 12-nautical-mile limit calculated from the base lines of Member States, in respect of which Member States may, until 31 December 1992, derogate from the equal access rule (Article 100 of the 1972 Act of Accession in conjunction with Article 6 of Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources, Official Journal 1983, L 24, p. 1). The questions submitted do not concern the special rules applicable to that 12-mile coastal area.
- 13 As regards the conservation of fishery resources, a Community system for their conservation and management, involving limitations of the fishing effort, was established pursuant to Article 102 of the 1972 Act of Accession by Council Regulation No 170/83. In addition, Council Regulation (EEC) No 2057/82 of 29 June 1982 (Official Journal 1982, L 220, p. 1) had already defined the control rules in order to ensure that the limits fixed for permissible levels of fishing were observed. Regulation No 2057/82 was amended by Council Regulation (EEC) No 4027/86 of 18 December 1986 (Official Journal 1986, L 376, p. 4).
- 14 Article 3 of Regulation No 170/83 provides for the fixing each year of the total allowable catches (TACs) available to the Community for each stock or group of stocks where, in the case of one species or a group of related species, it becomes necessary to limit the catch. Article 4(1) of that regulation provides that: 'The volume of the catches available to the Community referred to in Article 3 shall be distributed between the Member States in a manner which assures each Member

State relative stability of fishing activities for each of the stocks considered'. According to the wording of Article 4(2), there is a 'distribution of the resources among Member States'. Article 5(1) of Regulation No 170/83 provides that Member States may exchange all or part of the quotas allocated to them.

- 15 Article 5(2) provides that: 'Member States shall determine, in accordance with the applicable Community provisions, the detailed rules for the utilization of the quotas allocated to them'. It is provided that the detailed rules for the application of that paragraph are to be adopted, if necessary, in accordance with the procedure laid down in Article 14 — the 'management committee' procedure.
- 16 Thus, the provisions of that regulation established a system of national fishing quotas. As emerges from the provisions of Regulation No 2057/82, in particular from Article 10(1) thereof, and from the provisions of Regulation No 4027/86, the Community legislature attaches the national quotas to the fishing vessels flying the flag of, or registered in, each Member State; only those vessels may fish against its quotas.
- 17 It must be observed 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 Community law.
- 18 In this regard, Member States may refuse to allow fishing vessels to fish against their national quotas unless certain conditions are fulfilled with regard to, for example, the size, age or state of the vessel, its equipment, the number of fishermen on board, accommodation and mess facilities for the crew, sanitary arrangements, safety matters and so forth, in so far as those conditions are not governed exclusively by Community legislation.



19 The question to be examined is therefore whether and to what extent Community law precludes the laying down of conditions such as those at issue in the main proceedings. In this regard, the questions raised by the national court may be summarized as follows:

‘I — Does Community law preclude a Member State from laying down a condition for authorizing one of its vessels to fish against its quotas to the effect that:

(a) 75% of the vessel’s crew must be nationals of the Member States of the Community, and

(b) reside ashore in that Member State,

and that

(c) the skipper and all the crew must be making contributions to the social security scheme of that Member State?

II — Do Articles 55 and 56 of the 1985 Act of Accession allow Spanish crew members who are share fishermen to be excluded from that 75% until 1 January 1993?

III — May the provisions of Community law precluding the laying down of the conditions set forth above be relied on by the parties concerned before the national courts?’

### Question I(a)

20 As is clear from the judgment of the Court of 19 January 1988 in Case 223/86 *Pesca Valentia Ltd v Minister for Fisheries and Forestry* [1988] ECR 103, Community law does not preclude a Member State from enacting legislation requiring a minimum proportion of the crews of fishing vessels entered in its registers to be Community nationals.

- 21 The answer to this question must therefore be that Community law does not preclude a Member State from requiring, as a condition for authorizing one of its vessels to fish against its quotas, that 75% of the crew of the vessel in question must be nationals of the Member States of the Community.

### Question I(b)

- 22 In reply to this question it need only be stated that the residence requirement is not justified by the aim of the system of national quotas.
- 23 That aim emerges above all from Article 4 of Regulation No 170/83, interpreted in the light of the preamble to that regulation. Article 4 states that the total allowable catches are to be distributed in a manner which 'assures each Member State relative stability of fishing activities for each of the stocks considered'. The concepts of stability and relativity are defined in the preamble to the regulation. The sixth recital states that 'that stability . . . must safeguard the particular needs of regions where local populations are especially dependent on fisheries and related industries . . .'. The seventh recital states that 'it is [in] this sense that the notion of relative stability aimed at must be understood'. It should be added that it also emerges from the fourth recital in the preamble to Council Regulation (EEC) No 172/83 of 25 January 1983 fixing for certain fish stocks and groups of fish stocks occurring in the Community's fishing zone, total allowable catches for 1982, the share of these catches available to the Community, the allocation of that share between the Member States and the conditions under which the total allowable catches may be fished (Official Journal 1983, L 24, p. 30) that 'in order to make a fair allocation of available resources, particular account must be taken of traditional fishing activities, the specific means of areas particularly dependent on fishing and its dependent industries and the loss of fishing potential in the waters of third countries'.
- 24 It follows from the foregoing that the aim of the quotas is to assure to each Member State a share of the Community's total allowable catch, determined essentially on the basis of the catches from which traditional fishing activities, the local populations dependent on fisheries and related industries of that Member State benefited before the quota system was established.

25 In that context a residence requirement such as the one in point in this case is irrelevant to the aim of the quota system and cannot therefore be justified by that aim.

26 The answer to this question must therefore be that Community law precludes a Member State from requiring, as a condition for authorizing one of its vessels to fish against its quotas, that 75% of the crew of the vessel in question must reside ashore in that Member State.

### Question I(c)

27 As regards the condition requiring the skipper and all the crew to be making contributions to the social security scheme of the Member State concerned, it should be pointed out, as the Court stated in its judgment of 10 July 1986 in Case 60/85 *Luijten v Raad van Arbeid* [1986] ECR 2365, concerning the interpretation of the provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971, as amended by Council Regulation (EEC) No 1390/81 (Official Journal 1981, L 143, p. 1), that the provisions of Title II of that regulation constitute a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned.

28 It must be observed, however, that a condition such as that in question corresponds to the obligation laid down in Article 13 in Title II of that regulation, which, in paragraph 2(c), provides that: 'Subject to Articles 14 to 17 . . . a person employed on board a vessel flying the flag of a Member State shall be subject to the legislation of that State'. Consequently, such a condition cannot be considered to be prohibited by Community law.

29 It must be pointed out, however, that that conclusion presupposes that the condition stipulated complies not only with the rules but also with the exceptions laid down, in particular, in Article 14b of Regulation No 1408/71. That provision, which specifically relates to mariners, introduces an exception to the rule laid

down in Article 13(2)(c) since, in certain cases, it provides for the application of the legislation of a Member State other than the one whose flag the vessel flies.

- 30 It follows that a condition requiring the skipper and the crew to be making contributions to the social security scheme of the Member State concerned is not prohibited by Community law in so far as it is in conformity with the rules laid down by Regulation No 1408/71 of the Council.
- 31 The answer to this question must therefore be that, save in those cases where Regulation No 1408/71 of the Council otherwise provides, Community law does not preclude a Member State from requiring, as a condition for authorizing one of its vessels to fish against its quotas, that the skipper and all the crew of the vessel must be making contributions to the social security scheme of that Member State.

## Question II

- 32 It must be pointed out in this regard that the purpose of Articles 55 and 56 of the 1985 Act of Accession is to determine, on a transitional basis, the rules applicable to Spanish workers. In particular, the provisions in question introduce a derogation from the principle of the free movement of workers laid down in Article 48 of the EEC Treaty in so far as they exclude until 1 January 1993 the application to Spanish workers of Articles 1 to 6 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).
- 33 The national court asks whether fishermen working on board British vessels must be regarded as workers within the meaning of Article 55 of the 1985 Act of Accession when they are paid as share fishermen, that is to say on the basis of the proceeds of sale of their catches.
- 34 In replying to that question it should be observed first of all that the concept of worker, within the meaning of Article 55 of the 1985 Act of Accession, is identical to that in Article 48 of the EEC Treaty. It is therefore necessary to define the meaning of the term 'worker' in Community law.

- 35 As the Court held in its judgment of 3 July 1986 in Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, the Community concept of 'worker' must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.
- 36 The question whether a given relationship falls outside such an employment relationship must be answered in each case on the basis of all the factors and circumstances characterizing the arrangements between the parties, such as, for example, the sharing of the commercial risks of the business, the freedom for a person to choose his own working hours and to engage his own assistants. In any event, the sole fact that a person is paid a 'share' and that his remuneration may be calculated on a collective basis is not of such a nature as to deprive that person of his status of worker.
- 37 Consequently, the sole fact that Spanish fishermen working on board British vessels are paid on a 'share' basis does not exclude the application to them of Articles 55 *et seq.* of the 1985 Act of Accession.
- 38 It should be borne in mind, however, that the second subparagraph of Article 56(1) of that Act of Accession provides that: 'The Kingdom of Spain and the other Member States may maintain in force until 31 December 1992, with regard to nationals of the other Member States and to Spanish nationals respectively, national provisions, or those resulting from bilateral arrangements, making prior authorization a requirement for immigration with a view to pursuing an activity as an employed person and/or taking up paid employment'.
- 39 On this point reference must be made to the judgment of 23 March 1983 in Case 77/82 *Peskeloglou v Bundesanstalt für Arbeit* (1983) ECR 1085 concerning the interpretation of the second subparagraph of Article 45(1) of the 1979 Act concerning the accession of the Hellenic Republic to the European Communities (Official Journal 1979, L 291, p. 17), which is identical to the second subparagraph of Article 56(1) of the 1985 Act of Accession. It is clear from that

judgment that that provision, being a derogation from the principle of the free movement of workers laid down in Article 48 of the EEC Treaty, must be interpreted restrictively and that consequently, whilst the old Member States and those which acceded to the Community are authorized to maintain existing restrictions, they may not in any circumstances during the transitional period make more stringent the conditions governing the taking-up of employment by their respective nationals by introducing new restrictive measures. The second subparagraph of Article 56(1) of the 1985 Act of Accession must be interpreted in the same way.

- 40 It must also be borne in mind that in its judgment of 27 September 1989 in Case 9/88 *Lopes da Veiga v Staatssecretaris van Justitie* [1989] ECR 2989) the Court stated, with reference to Article 216(1) of the 1985 Act of Accession, whose terms are identical for Portuguese workers to those of Article 56(1) of the same Act of Accession, that there was no ground for refusing Portuguese workers already employed in the territory of one of the old Member States the benefit of the provisions of Title II of Regulation No 1612/68 relating to employment and equality of treatment. It follows from that judgment that although under Article 216(1) of the 1985 Act of Accession the old Member States are authorized to maintain existing restrictions with regard to Portuguese nationals, they may not maintain such restrictions with regard to those of them who, since a date prior to the accession of Portugal, have been pursuing an activity as employed persons on board a vessel flying the flag of another Member State and who have not been given a residence document entitling them to pursue such an activity in the territory of that State, if the employment relationship displays a sufficiently close link with the territory of the said Member State. That interpretation must also be applied to Article 56, which governs the situation of Spanish workers.

- 41 In conclusion, the answer to this question must be that Articles 55 and 56 of the 1985 Act of Accession must be interpreted as meaning that their application to Spanish fishermen working on board British vessels is not excluded by the sole fact that the fishermen in question are paid on a 'share' basis and as not precluding national legislation or a national practice whereby Spanish workers are excluded up to 1 January 1993 from 75% of the crew of those vessels, provided that such a restriction, introduced after the 1985 Act of Accession, does not in any circumstances make the position of Spanish workers more unfavourable and that the restriction does not concern Spanish nationals already employed at the time of accession as workers on British territory or on board a British vessel where the employment relationship displays a sufficiently close link with that territory.

### Question III

42 The answer to this question must be that none of the provisions of Community law which the Court has found it necessary to apply does not have direct effect. Consequently, those provisions may be relied upon by individuals before a national court.

### Costs

43 The costs incurred by the United Kingdom, Ireland, the Italian Government, the Kingdom of Spain and the Commission of the European Communities, 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 before the national court, costs are a matter for that court.

On those grounds,

### THE COURT,

in answer to the questions submitted to it by the High Court of Justice of England and Wales, by order of 1 December 1986, hereby rules:

- (1) Community law does not preclude a Member State from requiring, as a condition for authorizing one of its vessels to fish against its quotas, that 75% of the crew of the vessel in question must be nationals of the Member States of the Community.
- (2) Community law precludes a Member State from requiring, as a condition for authorizing one of its vessels to fish against its quotas, that 75% of the crew of the vessel in question must reside ashore in that Member State.
- (3) Save in those cases where Regulation (EEC) No 1408/71 of the Council otherwise provides, Community law does not preclude a Member State from requiring, as a condition for authorizing one of its vessels to fish against its quotas, that the skipper and all the crew of the vessel must be making contributions to the social security scheme of that Member State.

- (4) Articles 55 and 56 of the 1985 Act of Accession must be interpreted as meaning that their application to Spanish fishermen working on board British vessels is not excluded by the sole fact that the fishermen in question are paid on a 'share' basis and as not precluding national legislation or a national practice whereby Spanish workers are excluded up to 1 January 1993 from 75% of the crew of those vessels, provided that such a restriction, introduced after the 1985 Act of Accession, does not in any circumstances make the position of Spanish workers more unfavourable and that the restriction does not concern Spanish nationals already employed at the time of accession as workers on British territory or on board a British vessel where the employment relationship displays a sufficiently close link with that territory.
- (5) Since none of the applicable provisions of Community law does not have direct effect, those provisions may be relied upon by individuals before a national court.

Due	Slynn	Kakouris	Schockweiler	Koopmans	
Mancini	Joliet	O'Higgins	Rodríguez Iglesias	Grévisse	Díez de Velasco

Delivered in open court in Luxembourg on 14 December 1989.

J.-G. Giraud  
Registrar

O. Due  
President