Michaelmas Term
[2015] UKSC 63
On appeal from: [2014] EWCA Civ 71

JUDGMENT

The United States of America (Appellant) *v* Nolan (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

21 October 2015

Heard on 15 and 16 July 2015

Appellant
John Cavanagh QC
Sir Daniel Bethlehem KCMG QC
(Instructed by Nabarro LLP)

Respondent
The Respondent was not represented and did not appear

Intervener(Advocate to the Court)
Michael Beloff QC
Sarah Wilkinson
(Instructed by The Government Legal Department)

LORD MANCE: (with whom Lord Neuberger, Lady Hale and Lord Reed agree)

Introduction

1. In early 2006 the appellant, The United States of America, decided for strategic reasons to close the watercraft repair centre, known as RSA Hythe, which the United States Army maintained in Hampshire. The respondent, Mrs Nolan, was employed there as a civilian budget assistant, and the closure on 30 September 2006 involved her dismissal for redundancy on the previous day. She brought Employment Tribunal proceedings on 9 November 2006. The proceedings were brought under Part IV Chapter II, containing sections 188 to 198 of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 (SI 1995/2587). I will call the Act as amended "TULCRA" and the Regulations by which it was amended "the 1995 Regulations".

2. Mrs Nolan's complaint was that the appellant as her employer had, when proposing to dismiss her and other employees, failed to consult with any employee representative as required by the procedure for handling collective redundancies prescribed by Part IV Chapter II of TULCRA. There was no trade union at the base to represent Mrs Nolan's and other employees' interests. Accordingly, she made her complaint on the basis that she was an "employee representative" within section 188(1B). The appellant accepts that it made clear in June 2006 that there would be neither discussions nor consultation about the forthcoming closure. It denies that it was under the alleged duty.

State immunity

3. The appellant did not rely on state immunity when the proceedings were begun. It is common ground that it could successfully have done so. Whether this would have been under the State Immunity Act 1978 or at common law is presently immaterial. The 1978 Act is under section 16(2) inapplicable to "proceedings relating to anything done by or in relation to the armed forces of a state while present in the United Kingdom". Assuming that section 16(2) applies, there would have been immunity under common law principles, summarised by Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1583D-F. *Littrell v United States of America (No 2)* [1995] 1 WLR 82 is an example of a successful common law plea of state immunity; see also *Sengupta v Republic of India* [1983] ICR 221. As to why there was no plea of state immunity, it was not apparent at the outset that the duty

to consult under section 188 would apply to the closure of a base, rather than the consequences for employees after its closure. The potential for this extended understanding of the duty was only highlighted by the Employment Appeal Tribunal decision on 28 September 2007 in *UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area)* [2008] ICR 163. By then, the Employment Tribunal held, it was too late for the plea of state immunity which the appellant sought at that stage to raise. The validity of the extended understanding of the duty remains open to debate notwithstanding a later Court of Justice decision in *Akavan Erityisalojen Keskusliitto (AEK) ry v Fujitsu Siemens Computers Oy* (Case C-44/08) [2009] ECR I-8163, [2010] ICR 444, [2009] IRLR 944 ("*Fujitsu*").

TULCRA and EU law

4. Section 188 of TULCRA is in general terms. Subsection 1 provides:

> (1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be [affected] by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

Subsections (2) and (3) state the aims and nature of the required consultation. Subsection (7) provides:

> "(7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsections (1A), (2) or (4) the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances. …"

5. Various types of public employment are or may be taken outside the Part IV Chapter II, or outside the Act as a whole. Service as a member of the armed forces and employment which a minister certifies as required to be excepted from the Act for the purpose of safeguarding national security are taken entirely outside the Act by sections 274 and 275. Under section 273(1) to (4) the provisions of Part IV Chapter II of TULCRA have, for present purposes, no effect "in relation to Crown employment and persons in Crown employment". "Crown employment" here means "employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by an enactment",

and "'employee' and 'contract of employment' mean a person in Crown employment and the terms of employment of such a person" subject to a presently immaterial exception. Employment as a relevant member of House of Lords or House of Commons staff is outside Part IV Chapter II under sections 277 and 278. Under section 280, the term "employee" or "worker" does not include a person in police service, defined as meaning "service as a member of any constabulary maintained by virtue of an enactment, or in any other capacity by virtue of which a person has the powers or privileges of a constable". Finally, under section 286(2) the Secretary of State may by order made by statutory instrument provide that the provisions of inter alia Part IV Chapter II shall not apply to persons or employment of such classes as the order may prescribe, or shall only apply to them with such exceptions and modifications as the order may prescribe.

6. Part IV Chapter II of TULCRA gives effect to the United Kingdom's duty under European Union law to implement Council Directive 98/59/EC and its predecessor Council Directive 77/187/EEC. As originally enacted, it did not do so fully, with the result that the Commission brought proceedings against the United Kingdom which led to a Court of Justice judgment dated 8 June 1994 in Case C-383/92 [1994] ECR I-2479, [1994] ICR 664. One flaw identified by the judgment was that TULCRA (and its predecessor the Employment Protection Act 1975) did not require consultation in circumstances where employees did not enjoy union representation recognised by the employer. The Court of Justice held that Council Directive 77/187/EEC required member states to ensure that employee representatives would be designated for consultation purposes in such circumstances. The 1995 Regulations make provision accordingly by amending section 188.

7. The Directive contains the following articles:

Definitions and scope
Article 1

"1. For the purposes of this Directive:

(a) 'collective redundancies' means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the member states, the number of redundancies is:

(i) either, over a period of 30 days:

- at least ten in establishments normally employing more than 20 and less than 100 workers,

- at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,

- at least 30 in establishments normally employing 300 workers or more,

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

(b) 'workers' representatives' means the workers' representatives provided for by the laws or practices of the member states.

For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.

2. This Directive shall not apply to:

(a) collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts;

(b) workers employed by public administrative bodies or by establishments governed by public law (or, in member states where this concept is unknown, by equivalent bodies);

(c) the crews of seagoing vessels.

…

Final provisions

Article 5

> This Directive shall not affect the right of member states to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers."

8. While TULCRA in its original form (and its 1975 predecessor) failed until the 1995 Regulations properly to implement European Union law in certain respects identified in the Court of Justice's judgment in Case C-383/92 (para 6 above), in other respects they went beyond the requirements of such law. In particular:

> a) they provided until the 1995 Regulations that the consultation obligations arose if even a single redundancy was proposed;
>
> b) they provided for consultation "at the earliest opportunity" until 1995 (when this was replaced by the Directive requirement "in good time") and further provided (as TULCRA continues to do) for specific time limits within which consultation must occur (there being no such time limits in the Directives); and
>
> c) they applied (and TULCRA continued until 2013 to apply) to fixed term contracts (to which the Directive under article 1(2)(a) does not apply).

Most importantly for the present appeal, TULCRA in its original and amended form and its 1975 predecessor:

> d) contained and contain no express homologue of article 1(2)(b). They all exclude Crown employees and those in the police service. But they do not exclude public administrative bodies or public law establishments generally.

The present proceedings

9. The proceedings initiated by Mrs Nolan have not taken a straightforward course. She succeeded before the Employment Tribunal (LJ Guyer, Mrs S Foulser and Mr M W Heckford), obtaining on 17 March 2008 an order for remuneration for a one month protected period. The order was on 15 May 2009 upheld on appeal by the Employment Appeal Tribunal (Slade J, Mr D Norman and Mrs R Chapman). On a further appeal, the Court of Appeal (Laws, Hooper and Rimer LJJ) on 26 November 2010 ordered that there should be a reference to the Court of Justice on the question, raised by the decision in *UK Coal*, whether the obligation to consult arises "(i) when the employer is proposing, but has not yet made, a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies; or (ii) only when that decision has actually been made and he is then proposing consequential redundancies?"

10. The Court of Justice did not answer this question (Case C-583/10) [2013] ICR 193. It raised the issue whether Mrs Nolan's dismissal by the appellant, which is not an EU member state, fell within the scope of Directive 98/59/EC, having regard in particular to article 1(2)(b). Having heard submissions on this point, the court on 18 October 2012 gave a judgment with two parts. First, the court held that the Directive was both by virtue of its adoption under article 100 of the former EC Treaty (now article 94 TEU) and by nature part of the legislation aimed at improving the internal market; that activities like national defence, falling within the exercise of public powers, are in principle excluded from classification as economic activity; and that, by virtue of article 1(2)(b), the dismissal of staff of a military base falls outside the scope of the Directive, whether or not the base belongs to a non-member state (para 43). Secondly, the court addressed Mrs Nolan's submission that it should nonetheless rule on the question referred by the Court of Appeal, on the basis that TULCRA extends the provisions of the Directive in national law to cover article 1(2)(b) situations (other than in respect of Crown employment or employees and persons in the police service). The court (disagreeing on this point with Advocate General Mengozzi's approach) declined to give any such ruling on the basis that "If the EU legislature states unequivocally that the measure which it has adopted does not apply to a precise area, it renounces … the objective [of] seeking uniform interpretation and application of the rules of law in that excluded area" (para 55). The upshot was that the Court of Justice simply declined jurisdiction. So the questions raised by *UK Coal*/*Fujitsu* and the Court of Appeal's reference will in the present case have to be resolved, if ever necessary, domestically without further assistance from the Court of Justice.

11. Whether it will be necessary to resolve them in this case appears doubtful. The first part of the Court of Justice's judgment lent encouragement to an argument by the appellant that, since EU law did not require or intend a foreign state to be subject to the Directive's consultation obligations, United Kingdom law should be

read in the same sense. When the matter came back before the Court of Appeal after the Court of Justice's ruling, Mrs Nolan was prepared to concede the correctness in law of this argument and did not appear. The Court of Appeal (Moore-Bick, Rimer and Underhill LJJ) [2014] ICR 685 after hearing submissions from Mr John Cavanagh QC and Sir Daniel Bethlehem QC for the appellant nonetheless dismissed the appeal, and made an order (stayed pending any appeal to the Supreme Court) that there be a further hearing to deal with the remaining *UK Coal/Fujitsu* issue. The appellant duly sought permission to appeal to the Supreme Court. This was given on the basis that the appellant bear its own costs in respect of the appeal, including those of any advocate to the court who might be appointed, and do not seek any costs order in respect of any instance of the proceedings. The appeal has proceeded on that basis and The Honourable Michael Beloff QC and Sarah Wilkinson have been appointed and appeared as advocates to the court. The government, which might be expected to have an interest in the third point (vires) identified in the next paragraph, has not sought to intervene.

The issues

12. The appellant has through counsel raised two points of construction and one of vires. The first point of construction, argued by Mr Cavanagh QC, is that the domestic legal provisions should be given an interpretation conforming to that given in the first part of the Court of Justice's judgment, at least as regards foreign states' *jure imperii* activity. By *jure imperii*, is here meant any decision or act which is not *jure gestionis*, (or commercial) in nature. A state enjoys no general immunity in respect of *jure gestionis* decisions or acts. The second point, argued by Sir Daniel Bethlehem QC, is that the same construction should be reached as regards foreign states by virtue of or by reference to principles of international law forming part of or inspiring domestic law. The third point, that of vires, argued by Mr Cavanagh, is that the 1995 Regulations were *ultra vires* section 2(2) of the European Communities Act 1972, in that, when providing workers without trade union representation with the protection which the Court of Justice held in (Case C-383/92) to be required, they did not confine themselves to the sphere of EU law, as confirmed by the court in the present case, but went further by conferring extended protection on workers without trade union representation employed by public administrative bodies or public law establishments.

13. There is some overlap between the considerations relied upon by the appellant in relation to the two points of construction. The appellant focused on the overlap, which meant in its submission that TULCRA could not and should not on any view apply to foreign states' *jure imperii* activity. The two points have however different underlying logics. The logic of the first point is that TULCRA should be construed so as not to apply to employment by any public administrative body or public law establishment. The logic of the second is that TULCRA should be construed so as not to apply to foreign states' *jure imperii* activity. The third point,

vires, only arises if neither point of construction is accepted. It would if accepted have an effect similar to the first point, but only in circumstances where there is no trade union representation. In circumstances where there is trade union representation consultation would be required by primary legislation (TULCRA without reference to the 1995 Regulations), so that no question of vires could arise.

The first point of construction

14. Taking the first point of construction, it is a cardinal principle of European and domestic law that domestic courts should construe domestic legislation intended to give effect to a European Directive so far as possible (or so far as they can do so without going against the "grain" of the domestic legislation) consistently with that Directive: *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, *Vodafone 2 v Revenue and Customs Comrs* [2009] EWCA Civ 446, [2010] Ch 77, paras 37-38 and *Swift v Robertson* [2014] UKSC 50, [2014] 1 WLR 3438, paras 20-21. But that means avoiding so far as possible a construction which would have the effect that domestic implementing legislation did not fully satisfy the United Kingdom's European obligations. Where a Directive offers a member state a choice, there can be no imperative to construe domestic legislation as having any particular effect, so long as it lies within the scope of the permitted. Where a Directive allows a member state to go further than the Directive requires, there is again no imperative to achieve a "conforming" interpretation. It may in a particular case be possible to infer that the domestic legislature did not, by a domestic formulation or reformulation, intend to go further in substance than the European requirement or minimum. *R (Risk Management Partners Ltd) v Brent London Borough Council* [2011] UKSC 7, [2011] 2 AC 34, considered below, is a case where the Supreme Court implied into apparently unqualified wording of domestic Regulations a limitation paralleling in scope that which had been implied by the Court of Justice into general wording of the Directive to which the Regulations were giving effect: see *Teckal Srl v Comune di Viano* (Case C-107/98) [1999] ECR I–8121 ("*Teckal*"). It concluded that the two had been intended to be effectively back-to-back. A reformulation may also have been aimed at using concepts or tools familiar in a domestic legal context, rather than altering the substantive scope or effect of the domestic measure from that at the European level. But that is as far as it goes.

15. Directive 98/59/EC introduces requirements in favour of workers engaged in fields of economic activity. But it leaves it open to member states to apply or introduce even more favourable laws, regulations or administrative provisions than those it requires (article 5), and, whether or not article 5 confirms this, it certainly leaves it open to member states to apply or introduce similar or more favourable provisions in areas of non-economic activity, such as those of workers employed by public administrative bodies or public law establishments excluded from the Directive because of its internal market base and focus.

16. Heavy reliance was placed by the appellant on the Supreme Court's decision in *R (Risk Management Partners Ltd) v Brent London Borough Council and Harrow London Borough Council* [2011] 2 AC 34, in furtherance of the appellant's case that the Regulations must be limited in scope by reference to the Directive. The Supreme Court in *Risk Management* applied under the Public Contracts Regulations 2006 (SI 2006/5), passed to give effect to Council Directive 2004/18/EC, similar reasoning to that adopted by the Court of Justice in *Teckal*.

17. In *Teckal* the Comune de Viano had decided, without inviting competing tenders, to switch responsibility for its fuel supplies and heating system servicing from a private company, Teckal, to a corporate entity ("AGAC"), set up by a consortium of Italian municipalities to provide energy and environmental services to the participating authorities. Teckal challenged this decision as breaching Directive 93/36/EEC (a predecessor to Directive 2004/18/EC) on supply of goods. The Court of Justice examined the principles determining whether the new arrangement fell within the Directive 93/36/EEC, which contained the following definitions in article 1:

> "(a) 'public supply contracts' are contracts for pecuniary interest concluded in writing involving the purchase, lease [,] rental or hire purchase, with or without option to buy, of products between a supplier (a natural or legal person) and one of the contracting authorities defined in (b) below. The delivery of such products may in addition include siting and installation operations;
>
> (b) 'contracting authorities' shall be the state, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law; …"

18. The Court of Justice gave this guidance:

> "50. In that regard, in accordance with article 1(a) of Directive 93/36, it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part

> of its activities with the controlling local authority or authorities.
>
> 51. The answer to the question must therefore be that Directive 93/36 is applicable in the case where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority."

19. In *Risk Management*, Risk Management Partners Ltd ("RMP") complained that Harrow London Borough Council had awarded insurance contracts to a mutual insurer established by various local authorities without going through the public contract award procedure required by the 2006 Regulations. The Regulations applied to a "public services contract", defined as:

> "a contract, in writing, for consideration (whatever the nature of the consideration) under which a contracting authority engages a person to provide services but does not include - a public works contract; or a public supply contract; …"

The Regulations contained a list of "contracting authorities" which included "a local authority". Article 1 of the Directive, to which the Regulations gave effect, applied to public contracts, defined as:

> "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive."

The Directive defined "contracting authorities" as meaning:

> "the state, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law."

20. There was nothing in the Regulations in issue in *Risk Management* positively to have prevented the legislator going further than European law required. Nonetheless, the Supreme Court in *Risk Management* read the wording as qualified so as to have a like scope to that which the Court of Justice had given the Directive in issue in *Teckal.* The Supreme Court's reasoning is however important. In his leading judgment, Lord Hope of Craighead noted that the *Teckal* exemption was "not referred to anywhere in the Directive. It is a judicial gloss on its language" (para 17), and went on to say (para 22) that:

> "the basis for implying the Teckal exemption into the 2006 Regulations is to be found in their underlying purpose, which was to give effect to the Directive. The absence of any reference to the exemption in the Regulations is of no more significance than the absence of any reference to it in the Directive that was being transposed. The exemption in favour of contracts which satisfy its conditions was read into the Directive by the Court of Justice in *Teckal* because it was thought to be undesirable for contracts of that kind to be opened up for public procurement. This was not just a technicality. It was a considered policy of EU law. It would be odd if a significant and policy-based exemption were to apply in some member states and not others, especially as one of the aims of the Directive was to harmonise procedures. …"

21. In the other leading judgment in the case, Lord Rodger of Earlsferry said to like effect (para 92):

> "The 2006 Regulations give effect to the Directive in English law. In other words, they are the way in which English law secures the free movement of services and the opening-up to undistorted competition in relation to contracts which are to be placed by English local authorities. That being the purpose of the Regulations, they, too, cannot be meant to apply in circumstances where that purpose is not relevant because a contracting authority intends to contract with a body which is not properly to be regarded as an outside body. Although the *Teckal* criteria were formulated with particular reference to the predecessors of the Directive, they are simply a way of identifying situations where the authority can be regarded as obtaining the products or services which it requires in-house and, so, where there is no need to secure the free movement of services and the opening-up to undistorted competition. In my view, the criteria are an equally good indication of situations where, for that reason, the 2006 Regulations have no

> application. The insight of Advocate General Trstenjak in para 83 of her opinion in *Coditel Brabant* [2008] ECR I-8457, 8482 is instructive. To hold that the Regulations did apply in these circumstances would involve saying that the legislature intended to attach weight to competition law objectives in an area where they have no legitimate application. This would, in turn, involve inappropriate interference with local authorities' right to co-operate in discharging their public functions."

22. Lord Hope's further observations about the domestic legal history of the Regulations are relevant not only to construction, but also to the third point on vires, which I consider later. He said (para 24):

> "As Waller LJ said in *Oakley Inc v Animal Ltd (Secretary of State for Trade and Industry intervening)* [2006] Ch 337, para 39, the primary objective of any secondary legislation under section 2(2) must be to bring into force laws which, under the Treaties, the United Kingdom has agreed to make part of its laws. There is nothing in the explanatory memorandum to the Regulations that was prepared by the Office of Government Commerce and laid before Parliament to indicate that it was intended to depart from the jurisprudence of the court as to the scope of the Directive. In paras 7.2-7.4 of the memorandum it was stated that the change to the legislation was necessary to implement the new public procurement Directive, that it clarified and modernised the previous texts and that the simpler and more consistent public sector text should reduce the burdens involved under the EU rules. If the *Teckal* exemption were to be held not to apply to the 2006 Regulations, it could only be because the purpose of the Regulations was to apply the public procurement rules to relationships that fell outside the regime provided for by the Directive. But that would not be consistent with the memorandum, and it would not be a permitted use of the power."

23. In *Risk Management*, the indications were that the domestic measure was intended in the relevant respect to be no more than back-to-back with the European Directive. That cannot be said to be so in the present case. TULCRA contains no equivalent of article 1(2)(b) of the Directive. Instead, it contains specific and limited exceptions for Crown employment and employees and for certain others in public service. It is true that the remainder of the category of public workers comprised by article 1(2)(b) would have been relatively confined, comprising those engaged in the "exercise of public powers", rather than economic functions, as the Court of Justice indicated in *Scattolon v Ministero dell'Istruzione, dell'Università, e della Ricerca*

(Case C-108/10) [2012] ICR 740, paras 43-44. But this remaining category is nonetheless significant. Contrary to the appellant's submission, its inclusion within the scope of TULCRA cannot have been mere oversight. The careful exclusion of several specified categories of public employee speaks for itself. The variation of the Directive scheme enables, and according to the Employment Appeal Tribunal (para 84) has in many cases enabled, cases to be brought by those representing workers in public authorities. There are also other respects in which provisions of TULCRA have given protection in the form of consultation obligations which extends or has in the past extended, clearly deliberately, beyond the European requirement. It is, as Underhill LJ observed in the Court of Appeal (para 24) well understandable that a Labour government should in 1975, with trade union encouragement, have decided to give the scheme an extended domestic application to public employees.

24. That does not mean that the legislator in the present case necessarily realised or foresaw the existence of employees of a public authority consisting of a foreign non-EU member state such as the appellant, operating within the United Kingdom a base with its own employees. The appellant is the only foreign state with military bases in the United Kingdom, and it appears that civilian employees at United States Air Force (as distinct from Army) bases in the United Kingdom were and are, it seems, employed by the Crown. But the fact that a particular rare situation affecting a foreign state has not been foreseen is no reason for reading into clear legislation a specific exemption which would not reflect the wording or scope of any exemption in European law.

25. This is particularly so, when the natural reaction to any suggestion that a foreign state might be adversely affected in its *jure imperii* decisions - taken, according to the appellant, at the level of the US Secretary of Defense and US Secretary of the Army and in Washington - would have been that the foreign state would be entitled to rely on state immunity, in response to any suggestion that it should have consulted with its workforce in relation to a strategic decision to close any such facility. While there is no positive indication that this played a part in legislative or ministerial thinking, it is a factor of relevance when considering whether objectively TULCRA must be read as containing any such implied limitation as the appellant suggests.

26. The Court of Appeal and the advocates to the court also referred to section 188(7), with its limitation under "special circumstances" of any obligation to consult to whatever might be "reasonably practicable in those circumstances". It may be that this could be of assistance to the appellant, in resisting a claim that it had breached the consultation obligations in section 188. But to my mind it provides an unconvincing basis for any conclusion that this was, or is objectively, the way in the legislator should be seen as having catered for the possible anomalies that might flow from expecting a sovereign state to consult about a *jure imperii* decision to

close a naval or military facility. Section 188(7) is directed to special factual situations raising issues of feasibility apt for evaluation by the Employment Tribunal. It is much less obviously designed for situations where consultation might be thought to be incongruous for high policy reasons.

The second point of construction

27. I turn therefore to the second point of construction and to the additional considerations which it raises. As in the courts below, so before us the arguments advanced have been, as Slade J described them, both sophisticated and imaginative. They have also been careful and helpful in enabling the court to reach a conclusion on them. But like the courts below, I would reject them. In substance, Sir Daniel Bethlehem's submission on behalf of the appellant is that international legal considerations should lead to the recognition by the court of a tailored exemption from TULCRA in respect of dismissals involving redundancies arising from a *jure imperii* decision taken by a foreign state. He does not suggest that, if TULCRA otherwise applies, the appellant enjoys any defence outside TULCRA (such as act of state, which would only here arise if the challenge was to a decision or act of the appellant in the United States). His case depends on construing TULCRA as inapplicable to what happened. His starting point is the prima facie presumption that the legislator intends to legislate consistently with, and that legislation (if reasonably capable of being so construed) should be construed consistently with, the principles of international law: *Salomon v Customs and Excise Comrs* [1967] 2 QB 116, *Alcom Ltd v Republic of Columbia* [1984] 1 AC 580 and *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 2 AC 471, para 10.

28. Reduced to their essence, his submissions regarding international law are that:

> a) the application of TULCRA to dismissals of this nature would conflict with settled international law principles that one state does not legislate to affect the *jure imperii* activity of another;
>
> b) it would place the appellant in a unique position of potentially infringing United Kingdom law, by failing to consult, when the Crown in respect of British bases would have no such obligation, and when EU principles of non-discrimination would mean that other member states would also have to be regarded as having no such obligation; it would in that respect infringe either EU law or general international legal principles regarding non-discrimination.

29. Jurisdiction is primarily territorial in both international and domestic law. As the Permanent Court of International Justice said in *The Case of the SS "Lotus"* (1927) PCIJ Series A – No 10, pp 18-19, that:

> "… the first and foremost restriction imposed by international law upon a state is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts 'outside their territory', and if, as an exception to this general prohibition, it allowed states to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable."

30. The following overview appears in *Brownlie's Public International Law* 8th ed (2012), (ed by James Crawford SC, FBA), Chapter 21, pp 456-457:

> "The starting-point in this part of the law is the presumption that jurisdiction (in all its forms) is territorial, and may not be exercised extra-territorially without some specific basis in international law. However, the territorial theory has been refined in the light of experience and what amounts to extra-territorial jurisdiction is to some extent a matter of appreciation. If there is a cardinal principle emerging, it is that of genuine connection between the subject-matter of jurisdiction and the territorial base or reasonable interests of the state in question."

31. In the present case, the United Kingdom was in my opinion legislating in TULCRA entirely consistently with these principles. TULCRA is expressly stated to extend to England, Wales and Scotland. Part IV Chapter II regulates the procedures for dismissal on the grounds of redundancy of employees at institutions in those territories. It requires consultation within the jurisdiction with employees who are and whose employment is within the jurisdiction. Merely because the appellant may have taken a decision at the highest level in Washington, which led to dismissals on grounds of redundancy at a base in England, does not mean that the United Kingdom was legislating extra-territorially. It is in this sort of situation that a plea of state immunity may be most useful.

32. Sir Daniel Bethlehem referred to the American legal position, in particular the American Law Institute Restatement (Third) of the Foreign Relations Law of the United States (published May 14, 1986) and the United States Supreme Court decision of *F Hoffmann-la-Roche v Empagran SA* (2004) 542 US 155). Section 402 of the Reinstatement indicates that, subject to section 403, a state has jurisdiction to prescribe law with respect to "(a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory". The qualification in section 403 is that, even when one of the bases for jurisdiction under section 402 is present, "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable", this to be determined "by evaluating all relevant factors". The drafters seek to give this evaluation some bones by listing eight potentially relevant (but not exclusive) factors. Among them are "(a) … the extent to which the activity takes place within the territory, or has substantial, direct and foreseeable effect upon or in the territory" and "(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities …".

33. The US Supreme Court's decision in *Hoffmann-la-Roche* illustrates the significance of the principles in the Restatement. The case concerned the ambit of the Sherman Act in relation to a price-fixing conspiracy between foreign and domestic vitamin sellers allegedly raising prices both inside and outside the United States. The issue was whether the Sherman Act applied to purchases (described as "foreign transactions") by foreign distributors for delivery by Hoffmann-la-Roche outside the United States. The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") provided that the Sherman Act "shall not apply to conduct involving trade or commerce … with foreign nations unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect – (A) on trade or commerce which is not trade or commerce with foreign nations *[ie domestic trade or commerce]* …" (15 USC section 6a). The words "trade or commerce with foreign nations" were by the court held to cover foreign transactions. But the Court of Appeals had held that

the qualifying words ("unless …") brought all transactions, foreign and domestic within the Sherman Act. The US Supreme Court disagreed, holding that so far as the complaint depended on an adverse foreign effect on prices independent of any adverse domestic effect, it lay outside the scope of the Sherman Act.

34. Breyer JA, giving the judgment of the court, identified two main reasons, derived from comity and the statutory history, for concluding that the FTAIA did not bring independently caused foreign injury within the scope of the Sherman Act. In their light he rejected linguistic arguments to the contrary advanced by the complainants. As to the first reason, comity, he said, in Part IV of the judgment (with characteristic emphasis, as italicised):

> "… this court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. … This rule of construction reflects principles of customary international law — law that (we must assume) Congress ordinarily seeks to follow. See Restatement (Third) of Foreign Relations Law of the United States sections 403(1), 403(2) (1986) (hereinafter Restatement) (limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another state); *Murray v Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); …
>
> This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.
>
> No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused. …

> But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim*? Like the former case, application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial. See Restatement section 403(2) (determining reasonableness on basis of such factors as connections with regulating nation, harm to that nation's interests, extent to which other nations regulate, and the potential for conflict). Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?"

35. The FTAIA was capable of interpretation in two senses. An interpretation which excluded from its grasp foreign transactions causing foreign damage was, for the reasons given in this passage, readily available and understandable. The present case presents a different picture. There is no lack of clarity in the wording of TULCRA. The base at RSA Hythe, the complainants, the contracts of employment and the dismissals for redundancy which were regulated (on the face of it) by TULCRA were and are all within the United Kingdom. I am ready to assume that the base was operated in the United Kingdom for strategic reasons, and it is common ground that the decision to close it was taken in the United States for strategic reasons. The appellant's case is that there should be carved out of TULCRA, or any other relevant legislation, an exception for circumstances in which a foreign state takes a decision or commits an act of a *jure imperii* nature abroad which would otherwise lead to a person in the United Kingdom having a domestic right and remedy in respect of domestic employment or other domestic activity in the United Kingdom. The submission is far-reaching. It would require substantial re-formulation and expansion of the presumptive principles of construction referred to in the Restatement and in *Hoffmann-la-Roche,* and I am unable to accept it.

36. The submission would amount, in effect, as Sir Daniel recognised, to reading domestic legislation as subject to an exception or as inapplicable, at least prima facie, in relation to a foreign state in any circumstances where the foreign state could rely on a plea of state immunity, to avoid the adjudicative processes of another state in which proceedings had been brought against it. I do not accept that there is any such principle. It would make quite largely otiose the procedures and time for a plea of state immunity. As Hazel Fox CMG QC and Philippa Webb observe in *The Law of State Immunity* 3rd ed (2013), p 20:

> "Jurisdiction and immunity are two separate concepts. Jurisdiction relates to the power of a state to affect the rights of a person or persons by legislative, executive or judicial means, whereas immunity represents the independence and exemption from the jurisdiction or competence of the courts and tribunals of a foreign state and is an essential characteristic of a state. Logically the existence of jurisdiction precedes the question of immunity from such jurisdiction but the two are 'inextricably linked' (see Chapter IV)."

In Chapter IV, p 82, the authors go on further to explain the relationship, in this passage:

> "Immunity comports freedom or exemption from territorial jurisdiction. It bars the bringing of proceedings in the courts of the territorial state (the forum state) against another state. It says nothing about the underlying liability which the claimant alleges. Immunity does not confer impunity; the underlying accountability or substantive responsibility for the matters alleged in a claim remain; immunity merely bars the adjudication of that claim in a particular court. …
>
> As a matter of logic, the determination of jurisdiction precedes the consideration of immunity."

37. In its written case, para 116, the appellant put the same point in a way which met with the advocates to the court's assent:

> "A state's latitude to assert immunity in the face of a claim is different from the inapplicability of the law, by way of exemption or otherwise, to the impugned conduct of the foreign state in the first place. Immunity operates as a bar to the adjudicative jurisdiction of the courts of the forum state. It does not address the legislative or prescriptive jurisdiction of that state. A claim of immunity thus at some level acknowledges the forum state's legislative competence and the putative application of the domestic law in question to the foreign state but for the assertion of immunity."

38. Sir Daniel Bethlehem sought to emphasise the importance for a foreign state such as the appellant of recognising in TULCRA an implied exemption for a

decision to dismiss for redundancy taken on *jure imperii* grounds. The appellant would wish to comply with domestic law, and the ability to plead state immunity in any proceedings would not alter the fact that, without such an exemption, it would be and have been in breach of domestic law. That is true, but carried to its logical conclusion it would mean that all legislation should, however clear in scope, be read as inapplicable to a foreign state in any case where the state could plead state immunity. That would elide two distinct principles, and, as noted already, very largely make redundant a plea of state immunity at least in respect of any statutory claim. On Sir Daniel's argument, the legislation relating to unfair dismissal on which the claimant relied in *Sengupta v Republic of India* [1983] ICR 221 would presumably also have to be read as containing an implied exception for foreign states in *jure imperii* contexts, as would perhaps also the principles of common law negligence on which the claimant relied in *Littrell v United States of America (No 2)* [1995] 1 WLR 82.

39. Sir Daniel Bethlehem's submissions on discrimination start with the exclusion from the scope of Part IV Chapter II of TULCRA of Crown and police service employees. The exclusion is specific, and that itself makes it difficult to argue for an equivalent implied exclusion in respect of foreign state employees. In any event, there are circumstances in which, even on Sir Daniel's case, it would not be inappropriate for Part IV Chapter II to apply to a foreign government, for example in the (admittedly perhaps rare) case where a foreign state was itself responsible for a commercial activity in the United Kingdom, in respect of which it wished to declare all or some of its employees redundant.

40. Be that as it may be, Sir Daniel argues that non-discrimination is a general principle of international law. It was in terms accepted as such by the Court of Appeal in *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33, [2015] 3 WLR 301, para 61, but the context there was a claim by an individual foreign employee, asserting that section 4 of the State Immunity Act was contrary to articles 6 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or European Union law. (This was because it only lifted a foreign state's immunity in favour employees with contracts made in the United Kingdom or work to be wholly or partly performed there if such employees were nationals of or habitually resident in the United Kingdom.) A state cannot take advantage of articles 6 and 14 of the European Convention. Articles 1 and 2 of the Universal Declaration of Human Rights, article 26 of the International Covenant on Civil and Political Rights and article 14 of the European Convention, cited by the Court of Appeal, are likewise all provisions by states in favour of persons, not states. I will return to articles 20 and 21 of the Charter of Fundamental Rights of the European Union, which the Court of Appeal also cited.

41. The position as between states is expressed in *Oppenheim's International Law* 9th ed (1992) as follows, at para 114:

> "Although states are equal as legal persons in international law, this equality does not require that in all matters a state must treat all other states in the same way. There is in customary international law no clearly established general obligation on a state not to differentiate between other states in the treatment it accords to them. …
>
> Nevertheless, discrimination is widely regarded as undesirable, and in some particular respects a rule of non-discrimination may exist, within limits which are not clear. …"

Oppenheim goes on to discuss some possibilities, eg multi-lateral treaties, none of which is relevant here.

42. To give teeth to his submissions, Sir Daniel Bethlehem invokes European Union law, to which the Court of Appeal in *Benkharbouche* also referred. Article 18 TFEU provides:

> "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
>
> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination."

A provision in, effectively, the same terms as the first sentence is contained in the Charter of Fundamental Rights, article 21(2). On the basis of these provisions, Sir Daniel argues that United Kingdom courts would have to recognise other member states of the European Union as enjoying like exemptions from TULCRA to those TULCRA provides for UK Crown employees. This would in principle leave non-EU states out on a limb, but the only non-EU state actually shown to be affected would in practice be or be likely to be the appellant. That would, Sir Daniel submits, be absurd and should itself lead to an implication that foreign states should enjoy the like immunity. In any event, he submits, the principle of non-discrimination operates under European Union law horizontally to protect the appellant, even though it is neither a European citizen or an EU member state; in this connection, Sir Daniel invokes the Court of Justice's well-known if controversial jurisprudence in *Mangold v Helm* (Case C-144/04) [2006] All ER (EC) 383 and *Kücükdeveci v Swedex GmbH & Co KG* (Case C-555/07) [2010] All ER (EC) 867, both in fact cases of age discrimination.

43. Whether article 18 TFEU and/or article 21(2) of the Charter of Fundamental Rights apply in favour of member states can be left open. Whether, if they do, it would be open to a member state to rely on them horizontally as against a complainant like Mrs Nolan can also be left open. It is not clear in European law how far and when the principles in *Mangold* and *Kücükdeveci* apply in cases not involving age discrimination. The court considered such an issue in *Association de médiation sociale v Union locale des Syndicates CGT* (Case C-176/12) [2014] ICR 411. The domestic Labour Code excluded from calculation "holders of an accompanied-employment contract" (young persons being directed towards more stable employment or social activities), of whom the Association de médiation sociale ("AMS"), a private non-profit making organisation, employed well over 100. The result of the exclusion was that AMS counted as having only eight employees under the Labour Code, and so fell domestically below a threshold of 50 (based on the Directive 2002/14/EC) which would otherwise have triggered obligations on its part to inform and consult. The court held that the Labour Code by excluding accompanied-employees from the calculation of numbers was in breach of the Directive.

44. Article 27 of the Charter requires that "Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices". The question thus arose whether article 27 of the Charter, read with the Directive, could be relied on horizontally in proceedings between AMS and the Union locale des Syndicates. Differing on this point from Advocate General P Cruz Villalón, the Court of Justice held that it could not, saying that it was "clear from the wording of article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law" (para 45). This was so although the Labour Code must, it appears, have contained specific provisions regarding information and consultation for those employers who, under its own defective method of calculation, did have 50 or more employees. So it is at least open to question whether article 18 TFEU or article 21(2) of the Charter, read with the provisions of TULCRA, would necessarily have direct horizontal effect in favour of another EU member state.

45. There are however to my mind two fundamental flaws in Sir Daniel's submissions at this point. The first is that articles 18 and 21(2) apply expressly only within the scope of application of European law, or, as it was paraphrased in *Association de médiation sociale*, para 42, "in … situations governed by European law". The same point was made by the Court of Justice as long ago as 1974 in *Walrave v Association Union Cycliste Internationale* (Case C-36/74) [1974] ECR 1405. In the present case, the Court of Justice declined to rule on the interpretation of Directive 98/59/EC for the very reason that, to the extent that TULCRA covers workers employed by public administrative bodies or by public law establishments, it goes beyond European Union law into an area to which "the EU legislature states

unequivocally that the measure which it has adopted does not apply", and in which "the objective [of] seeking uniform interpretation and application of the rules of law" has been renounced: para 55. Since the issue in the present case arises in precisely that area, it is not possible to conclude that the appellant or indeed any EU member state, let alone any non-member state, could insist on European Union law as giving it any horizontal or other entitlement.

46. The second flaw is that I do not regard a non-member state as being within the protection of articles 18 and 21(2) in any circumstances. In *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 1 WLR 783, para 83, Lady Hale said of the then equivalent article:

> "This is not a general prohibition of discrimination on grounds of nationality. Only the nationals of member states are protected. Discrimination against third country nationals is not prohibited. Indeed it is positively expected. The underlying purpose is to promote the objects of the Union and in particular the free movement of workers between the member states and the free establishment of businesses within them."

The Court of Justice's case law is to like effect: *Vatsouras v Arbeitsgemeinschaft (AGRE) Nürnberg 900* (Joined Cases C-22/08 and C-23/08) [2009] ECR I-4585, [2009] ALL ER (EC) 747, para 52 and *Martinez Sala v Freistaat Bayern* (Case C-85/96) [1998] ECR I-2691, para 62. The Court of Appeal recently reached the same conclusion in *Sanneh v Secretary of State for Work and Pensions* [2015] EWCA Civ 49, para 106. The freedom of this country's universities to charge unrestricted tuition fees to non-EU citizens, while having in this respect to assimilate citizens of other EU countries with British citizens, is an example of the impact of this principle.

47. For these reasons, I am unable to accept the appellant's second point on construction any more than its first.

The third point – the vires of the 1995 Regulations

48. I come to the third point, the appellant's submission that the 1995 Regulations were ultra vires section 2 of the European Communities Act 1972. When providing workers without trade union representation with the protection which the Court of Justice had in (Case C-383/92) held to be required, the Regulations did not confine themselves to the sphere of EU law, confirmed by the court in the present case. They went further by conferring extended protection on workers without trade union representation employed by public administrative bodies or public law

establishments. In that respect, the appellant submits, they went beyond any power conferred by section 2.

49. Section 2 of the 1972 Act (as amended by sections 27 and 33 of the Legislative and Regulatory Reform Act 2006 and sections 3 and 8 of and Part I of the Schedule to the European Union (Amendment) Act 2008) reads:

> "**General implementation of Treaties**
>
> (1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.
>
> (2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision -
>
> > (a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
> >
> > (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;
>
> and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid. …

(3) …

(4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council or orders, rules, regulations or schemes."

50. Schedule 2 paragraph 1 (as amended by section 32 of the Criminal Law Act 1977 and sections 38 and 46 of the Criminal Justice Act 1982) contains the following restriction on the powers conferred by section 2(2):

"The powers conferred by section 2(2) of this Act to make provision for the purposes mentioned in section 2(2)(a) and (b) shall not include power -

(a) to make any provision imposing or increasing taxation; or

(b) to make any provision taking effect from a date earlier than that of the making of the instrument containing the provision; or

(c) to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal; or

(d) to create any new criminal offence punishable with imprisonment for more than two years or punishable on summary conviction with imprisonment for more than three months or with a fine of more than level 5 on the standard scale (if not calculated on a daily basis) or with a fine of more than £100 a day."

51. Section 2 of the 1972 Act recognises the different types of EU legislative measure. Article 288 TFEU states a well-known trifurcation:

> "A Regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states.
>
> A Directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them."

52. Section 2(1) gives the force of law in the United Kingdom to all the rights, etc and remedies and procedures to which it refers, which are "in accordance with the Treaties … without further enactment to be given legal effect or used in the United Kingdom". It is the means by which Regulations have effect. Section 2(2) concerns obligations of the United Kingdom to be implemented, or rights of the United Kingdom to be enjoyed, under or by virtue of the Treaties. A right or obligation under a Directive is the classic instance. As article 288 indicates, Directives are not as specific as Regulations in their impact or, often, in their terms. Member states have a degree of latitude in their implementation, provided they achieve the intended result. Paragraph (a) of section 2(2) enables provision to be made by order in council or ministerial or departmental order, rule, regulation or scheme for the purpose of implementing any such obligation, or enabling any such right to be exercised. Paragraph (b) enables provision to be made for dealing with "matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time of subsection (1)".

53. The ambit of section 2(2) has been considered in a number of cases. The leading authority is *Oakley Inc v Animal Ltd* [2005] EWCA Civ 1191, [2006] Ch 337. Since then section 2(2) has been considered by Moses LJ in *R (Cukorova Finance International Ltd) v HM Treasury* [2008] EWHC 2567 (Admin), [2009] EuLR 317, by Lord Hope in *Risk Management* [2011] 2 AC 34 (para 22 above), by the Employment Appeal Tribunal in *Pothecary Witham Weld v Bullimore* [2010] ICR 1008 and by Floyd J, who identified as many as 14 relevant principles in *ITV Broadcasting Ltd v TV Catchup Ltd (No 2)* [2011] EWHC 1874 (Pat), [2011] FSR 40.

54. In *Oakley*, Directive 98/71/EC on the legal protection of designs required member states to approximate their legislation, but provided an option permitting them to derogate and retain in force existing legislation for registered designs. The option, found in article 11(8) of the Directive, read:

> "8. Any member state may provide that, by way of derogation from paragraphs 1 to 7, the grounds for refusal of registration or for invalidation in force in that state prior to the date on which the provisions necessary to comply with this Directive enter into force shall apply to design applications which have been made prior to that date and to resulting registrations."

55. In issuing the Registered Designs Regulations 2001 (SI 2001/3949), the Secretary of State made use of this option. By regulation 12 he retained in force the Registered Designs Act 1949, as amended in 1988, in relation to designs already registered, so making use of this option. The Court of Appeal rejected the submission that regulation 12 required primary legislation. All three members of the court considered that regulation 12 could be regarded as being within section 2(2)(a) of the 1972 Act, as having been for the purpose of implementing an EU obligation or enabling one to be implemented (para 29, per Waller LJ, para 46 per May LJ and paras 64-67 per Jacob LJ).

56. All three members of the court also went on to express views on the scope of section 2(2)(b). Waller LJ considered that the words used in section 2(2)(b) must "take their context from … the primary purpose of section 2", that being "the bringing into force under section 2 of the laws, which under the Treaties the United Kingdom has agreed to make part of its laws"; para 39. On that basis he added this in the same paragraph:

> "… section 2(2)(b), from its position in section 2, from the fact that it adds something to both subsections (1) and (2), and from its very wording is a subsection to enable further measures to be taken which naturally arise from or closely relate to the primary purpose being achieved. I accept that I will be accused of adding the words 'naturally' and 'closely', but I believe that describes the context which provides the meaning of the words."

57. May LJ said (para 47):

> "I do not consider that to hold that the making of these transitional provisions came within section 2(2)(a) has the effect of making section 2(2)(b) devoid of content. There is a distinction between providing something which, although it is a choice, is a choice which the implementation of the Directive requires you to make, and one which is not so required, but which has the effect of tidying things up or making closely related original choices which the Directive does not necessarily require. Section 2(2)(b) is confined by its words and context. Redefinition in the abstract is to be avoided."

58. Jacob LJ addressed the topic in some detail. He had no doubt that section 2(2)(a) covered the case where a Directive contains explicit alternatives and the implementing statutory instrument merely selects one of these (para 73). Questioning whether it also covers the supply of detail which Directives frequently leave to member states to spell out, he observed that, in his view, "the wider section 2(2)(a), the narrower section 2(2)(b) is likely to be" (para 74). In paras 79-80 he expressed his provisional views:

> "79. My own view, provisional though it must be in the absence of any specific context relevant to this case, is this: that section 2(2)(a) covers all forms of implementation – whether by way of choice of explicit options or by way of supply of detail. Both of these are 'for the purpose of implementing' or 'enabling any such obligation to be implemented'. Supplying detail required by a Directive is just that.
>
> 80. So section 2(2)(b) indeed adds more …. How much more must depend on the particular circumstances of the case – the statutory language is the guide. It says "for the purpose of dealing with matters arising out of or related to". Whether a particular statutory instrument falls within those words must depend on what it purports to do and the overall context. One cannot put a gloss on the meaning. If Otton LJ [in *R v Secretary of State for Trade and Industry, Ex p UNISON* [1996] ICR 1003] was adding a gloss – 'distinct, separate or divorced from it' – then I do not agree with that gloss. You just have to apply the statutory language to the case concerned. And in doing so you bear in mind that the purpose of the power given by the section is European – the article10 purpose. Whether or not Otton LJ was right in the circumstances of, I … do not decide. It would not be right to do so in the absence of the affected parties.

> The reference to Otton LJ's words was to a sentence in which Otton LJ said that he was satisfied that the provision made was "related to a Community obligation, and not distinct, separate, or divorced from it" (*R v Secretary of State for Trade and Industry, Ex p UNISON* [1996] ICR 1003, 1014G-H).
>
> Article 10 of the then Treaty establishing the European Community read:
>
> > "Member states shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. …"

59. Some general observations are possible, arising from these passages. First, so far as possible, it is clearly desirable to avoid paraphrase, though almost impossible to do so completely, if any greater light is to be shed on the scope of their application. Second, as Waller LJ (and also May LJ) indicated, words such as those used in section 2(2) must be seen in the context of "the primary purpose of section 2", that being "the bringing into force under section 2 of the laws, which under the Treaties the United Kingdom has agreed to make part of its laws". Third, that is the context in which Parliament was prepared to delegate law-making ability to the executive – because the focus of section 2(2) is on obligations to the implementation of which the United Kingdom is already committed (and rights to which it is already entitled) at the European level by virtue of its EU membership. Parliament will itself have had prior opportunities for scrutiny of, and input into the content of, the European measures giving rise to such obligations and rights, through in particular Select Committee procedures, at the stage when such measures were being developed and proposed by the European Commission and considered in Europe by member states and the European Parliament.

60. Fourth, section 2(2) authorises the making of provisions for two differently expressed purposes. In the case of paragraph (a), the purpose expressed is implementing or enabling the implementation of any EU obligation (or the enabling the exercise of any EU right enjoyed by the United Kingdom). In the case of paragraph (b), it is "dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of" section 2(1). It is not in my view appropriate to get too involved in a linguistic debate about whether these paragraphs should be read entirely disjunctively or whether there may be some overlap. But Jacob LJ was, I think, right in saying that "the wider section 2(2)(a), the narrower section 2(2)(b) is likely to be" – that is so, because the language of paragraph (b) introduces bottom line limitations of the power it confers.

61. What can in my view be said, from the wording and positioning of these two paragraphs, is that paragraph (a) is the main vehicle for implementation of EU obligations and rights which are not directly enforceable. Paragraph (b) goes further, in authorising provision for different purposes, but those purposes are limited by reference to the United Kingdom's EU obligations or rights (or the coming into force, or operation, of section 2(1)). The words "arising out of" limit the power to provisions dealing with matters consequential upon an EU obligation or right (or the coming into force, etc, of section 2(1)). The further phrase "related to any such obligation or rights", must, unless redundant, go somewhat further. But the relationship required must exist objectively; and the positioning of the phrase and its conjunction with the earlier wording of section 2(1) suggest to me, as they did to Waller and May LJJ, that by speaking of a "relationship" the legislature envisaged a close link to the relevant obligation or right. A relationship cannot on any view arise from or be created by simple ministerial decision that it would be good policy or convenient to have domestically a scheme paralleling or extending EU obligations in a field outside any covered by the EU obligations. That would be to treat paragraph (b) as authorising a purpose to implement policy decisions not involving the implementation of, not arising out of and unrelated to any EU obligation.

62. A fifth and final point is that it is, in the light of the above, possible to describe section 2(2) as both wide and confined in scope. It is wide because it authorises almost every conceivable provision required to fulfil the United Kingdom's obligations under article 4.3 TEU (or to give effect to any EU right) subject only to the restrictions in Schedule 2. It is confined because any such provision must be for the purpose of implementing, or dealing with a matter arising from or related to, such an obligation or right.

63. Some conclusions can fairly readily be drawn. Consistently with a view taken, I understand, by all members of the court in *Oakley*, it is clear, that, where a Directive is in general terms leaving member states freedom to decide on the precise means for its implementation, provisions which the United Kingdom makes within the scope of such freedom will on the face of it fall within section 2(2)(a), as being for the purpose of implementing or enabling the implementation of the Directive. Second, where a Directive confers a choice of specific alternatives, as Directive 98/59/EC did in article 1(1)(a) (see para 7 above) a provision selecting one or other alternative will also fall within section 2(2)(a). Where a Directive gives member states a specific option to derogate from its provisions in a particular respect - in *Oakley* as regards design applications made prior to the date of domestic implementation of the Directive and as regards resulting registrations – then I again agree with the court in *Oakley* that the exercise of this option can be regarded as falling within section 2(2)(a), and, further, that if that were not so, then it would, in any event, be related to the implementation of the United Kingdom's EU obligation within section 2(2)(b).

64. At the other end of a spectrum is a situation such as Lord Hope considered in *Risk Management*, para 24 (para 22 above). That is where a Directive, such as Directive 2004/18/EC in that case, (i) addresses an internal market competition issue, by introducing procedures for the award of public works, supply and service contracts, but does not cover a situation where (ii) public authorities contract inter se, or where (iii) a local authority exercises over the other contracting party "a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities": see *Teckal* (Case C-107/98) [1999] ECR I-8121, para 50. In that context, Lord Hope, with whose judgment three other members of the court agreed, considered that it would not be a permitted use of the power conferred by section 2(2) "to apply the public procurement rules to relationships [such as those in (ii) and (iii)] that fell outside the regime provided for by the Directive": para 22 above. In agreement with Lord Hope, I consider that, where a Directive is based on an internal market competence and as a result limited in impact to internal market situations, its domestic extension to situations outside the internal market cannot be regarded as being within either section 2(2)(a) or (b) of the 1972 Act. This is so whether it is so limited by implication or expressly.

65. More difficult are intermediate situations where a Directive is limited to, or specifically excludes, a particular area of the internal market. An example of a Directive limited to a particular area of the internal market is Directive 2002/47/EC which was in issue in *Cukurova* [2009] EuLR 317. Directive 98/59/EC in issue in the present case is an example of a Directive with both limitations and specific exclusions which appear to fall within the internal market: It is limited by article 1(1)(a) to collective redundancies. It excludes in article 1(2)(a) limited period contracts, which might affect the functioning of the internal market competition. I say nothing on the question whether the exclusion in article 1(2)(c) of the crews of seagoing vessels operates in an area which might affect the internal market or was because this was seen as a situation, like that covered by article 1(2)(b), where the internal market was not affected.

66. In my view, provisions extending an EU regime domestically into areas not covered by or specifically excluded from the EU regime contemplated by a Directive may well fall outside both paragraphs of section 2(2). Each case would have to be considered on its own merits. Some adjustments to situations in which a Directive operates may be regarded as necessary or appropriate for the purpose of implementing or enabling the implementation of a Directive, or as being "related to" the relevant EU obligation in the sense already discussed. *Pothecary* [2010] ICR 1008 is an example of a case where the Secretary of State used section 2(2)(b) to provide for a reverse burden of proof in section 63A of the Sex Discrimination Act 1975 (as inserted by regulation 5 of the Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001/2660) in cases of alleged victimisation. There was no obligation under European law to have a reverse burden in such cases. There was

under the Burden of Proof Directive 97/80/EC an obligation to have a reverse burden in cases of alleged unequal treatment, but the Employment Appeal Tribunal concluded that the right not to be victimised did not form part of the principle of equal treatment, but was an ancillary right accorded by EU law to render that principle properly enforceable. On that basis, it held, unsurprisingly, that introducing a reverse burden in respect of a right which European law treated as ancillary to its prohibition of discrimination was dealing with a matter related to an EU obligation, within section 2(2)(b).

67. In *Cukurova* Directive 2002/47/EC was expressly limited to transactions between certain institutions, but the Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226) issued by HM Treasury implementing it extended the range of the regime to cover other institutions. Moses LJ was concerned with a question whether Cukurova should be allowed an extension of time within which to challenge the vires of the Regulations. Ultimately, all he did was express such "considerable doubts" about Cukurova's prospects of success in its challenge as to lead him to a conclusion that justice did not demand an extension of time. Nonetheless, it is worth looking at the case more closely, because in my view Moses LJ greatly underestimated the force of Cukurova's challenge.

68. Article 1(1) of Directive 2002/47/EC stated that it "lays down a Community regime applicable to financial collateral arrangements [defined by article 2.1(a) as meaning a "title transfer financial" or a "security financial" collateral arrangement] which satisfy the requirements set out in paragraphs 2 and 5 and to financial collateral in accordance with the conditions set out in paragraphs 4 and 5". Paragraph 2 stated that "The collateral taker and the collateral provider must each belong to one of the following categories". These included a wide range of (a) public authorities or bodies, (b) central or development banks, (c) financial institutions subject to prudential supervisions and (d) central counterparties, settlement agents or clearing houses as well as (e) "a person other than a natural person, including unincorporated firms and partnerships, provided that the other party is an institution as defined in points (a) to (d)". By these categories, the Directive notably did not cover hedge funds. Paragraph 3 permitted member states to "exclude from the scope of this Directive financial collateral arrangements where one of the parties is a person mentioned in paragraph 2(e)". Recital 22 stated the objective of the Directive to be "to create a minimum regime relating to the use of financial collateral", this being an objective which, it went on, "cannot be sufficiently achieved by the member states and can therefore … be better achieved at Community level ...".

69. In place of the carefully delineated categories of institution and concern covered by the Directive, the 2003 Regulations put in place a regime covering title transfer financial collateral arrangements and security financial collateral arrangements where "the collateral-provider and the collateral-taker are both non-natural persons": regulation 3. I find it difficult to see how this could be regarded as

having been for the purpose of implementing or enabling the implementation of the EU Directive. Equally, the extension did not arise out of the obligations in the Directive and was not related to them. It was on its face the product of a decision by HM Treasury that it would be good policy domestically to have a more extensive regime operate within the United Kingdom. That is something which was of course open to the United Kingdom under European law, since the Directive was a measure of minimum harmonisation. But it was under the United Kingdom constitution and the 1972 Act a matter which was not for the executive to decide, but for Parliament to consider and, it if thought fit, to agree as a matter of primary legislation.

70. Returning to the present case, it falls in my view even more clearly within the category which Lord Hope was considering in *Risk Management*. It also concerns a Directive issued by the European legislature under its internal market competence, which in the present case specifically excludes by article 1(2)(b) situations outside that competence. The express liberty in article 5 for member states to make provisions more favourable to workers does not in my view lead or point to a contrary view. It cannot have been directed to matters which would be outside the European Union's internal market competence. Even in relation to matters within the Union's internal market competence, an article of this nature does no more on its face than confirm that the Directive is a minimum harmonisation measure, which leaves member states free to introduce more favourable provisions as a matter of domestic law. This does not mean that such provisions are necessarily to be regarded as dealing with matters related to any EU obligation or rights.

71. It follows that, had the provisions of TULCRA in its unamended form been the product of subordinate legislation under section 2(2) of the 1972, they would, on Lord Hope's analysis, have been ultra vires at least in so far as they purported to extend the required procedure for dismissals involving redundancies to situations falling within article 1(2)(b) of Directive 98/59/EC. However, TULCRA in its unamended form was actually a piece of primary legislation. So far as Parliament chose by TULCRA in its unamended form to extend the required procedure for dismissals involving redundancies, it was fully entitled to do so. Parliament has no need to show any particular competence base for primary legislation. It can legislate at will and at the same time achieve both European Union aims and domestic aims, as long as the latter are not positively inconsistent with the former. But TULCRA in its unamended form was confined to situations where the relevant employees had trade union representation. When the executive chose to rectify this by using section 2(2) of the 1972 Act to cover situations where there was no trade union representation, it did so across the whole width of the previous legislation - so as to affect not only situations within the internal market scope of Directive 98/59/EC, but also the domestic situations to which Parliament had also extended the required procedure for dismissals. If Lord Hope's analysis is correct, does this mean that the amendments to TULCRA by the 1995 Regulations must to that extent be regarded as ultra vires?

72. I have found this a difficult and borderline question to answer. Ultimately, I have come to the conclusion that it can and should be answered in the negative. TULCRA in its unamended form represented a unified domestic regime. The Court of Justice in 1994 identified a flaw in the protection provided, in that it did not cater for non-trade union situations. It is entirely unsurprising that the 1995 Regulations did not distinguish between parts of TULCRA which were and were not within the internal market competence or within article 1(2)(b) of the Directive. I think that, in these unusual circumstances, Parliament can, by enacting TULCRA in its unamended form, be regarded as having created, for the future domestic purposes of the 1972 Act, a relationship between the EU obligation (which it was a primary object of Part IV Chapter II of TULCRA in its unamended form to implement) and the categories of public employment falling within article 1(2)(b) of Directive 98/59/EC (which Parliament decided without any EU obligation to do so to cover by TULCRA in its unamended form). That relationship having been established by TULCRA in its unamended form, it seems to me that the executive was entitled to take it into account and to continue it by and in the 1995 Regulations.

Conclusion

73. For all these reasons, I would dismiss the appellant's appeal on all three points, and affirm the judgments of the courts below. The case should as a result be remitted to the Court of Appeal for determination, so far as necessary, of the *UK Coal/Fujitsu* issue referred to in paras 3 and 10-11 of this judgment.

LORD CARNWATH: (dissenting)

Overview

74. This case has an unfortunate procedural background, which has been described by Lord Mance. Among other grounds raised by the appellants (which in agreement with my colleagues I would dismiss), it raises two difficult issues at the interface between European and domestic law: first, the extent of the power conferred by section 2(2)(b) of the European Communities Act 1972 to legislate in the UK by statutory instrument on matters "arising out of or related to" obligations under European law; secondly, the approach of the domestic court to an issue of European law ("the *Fujitsu* issue" – see below) which arises under a UK statute modelled on a European Directive, but which has been held to be outside the competence of the European court. As will be seen, the two are in my view linked. Unfortunately, only the first is before this court on the present appeal. The second will have to be determined by the Court of Appeal if the present appeal fails, and may return here at a later date.

75. There is the further difficulty that neither of the parties to the appeal has more than a limited interest in the resolution of either issue as a matter of law. The United States of America, as appellant, has no direct interest in the resolution of issues of English or European law. It is only before the court because it failed at an early stage (for understandable reasons at the time) to claim sovereign state immunity. (It is common ground that if a claim to state immunity had been made at the outset it would have succeeded.) Mrs Nolan, the nominal respondent, has not contested the appeal, either in the Court of Appeal or in this court. The UK government, which might be thought to have a substantial interest in both issues has chosen not to intervene, though informed of the appeal.

76. In these unusual circumstances we are more than usually grateful for the assistance of Mr Beloff QC and Miss Wilkinson as advocates to the court. However, it is no reflection on them that we have been unable to explore in any detail the wider implications of this case for the transposition of European law in this country more generally. For this reason, had my colleagues agreed with my firm provisional view that the appeal should be allowed on this issue, I would have been reluctant to reach a final conclusion without allowing the UK government a further opportunity to submit representations. The conclusions set out below are to that extent provisional.

77. I adopt gratefully Lord Mance's exposition of the facts and the relevant statutory provisions.

Procedural history

78. Lord Mance has summarised the procedural history, but some expansion may be helpful in setting the scene for discussion of the issue on which we are divided.

79. As he has noted, an important event was the decision of the Employment Appeal Tribunal, in *UK Coal Mining Ltd v National Union of Mineworkers* [2008] ICR 163), given in September 2007. To explain its importance I can refer to Underhill LJ's summary [2014] ICR 685, para 9:

> "The trend of English authority until comparatively recently was to the effect that the collective redundancy provisions, even when read with the Directive, did not oblige an employer to consult about, or therefore disclose the reasons for, the underlying business decision which gave rise to a proposed collective redundancy – the paradigm case being the closure of a workplace – but only about the consequences of that decision. ... However, the decision of the ECJ in *Junk v Kühnel* (Case C-

> 188/03) [2005] ECR I-885, raised a serious question whether that approach was compatible with EU law. In *UK Coal Mining* …, the Employment Appeal Tribunal (Elias J, President, presiding) declined explicitly to depart from the established approach (while expressing some reservations about it); but it nevertheless held that in a case where a decision to close a workplace and the consequent decision to make redundancies were 'inextricably interlinked' the obligation to consult about the reasons for the latter necessarily involved an obligation to consult about the reasons for the former – and thus required the employer to initiate consultations prior to the closure decision. The CJEU revisited this issue in *Akavan Erityisalojen Keskusliitto (AEK) ry v Fujitsu Siemens Computers Oy* (Case C-44/08) [2010] ICR 444; [2009] ECR I-8163 ('the *Fujitsu* decision'); but unfortunately the effect of its reasoning is, to put it no higher, not entirely clear."

80. As Underhill LJ explained (para 10), this change of understanding had important implications for the present case, in particular in the context of the USA's failure to rely before the tribunal on sovereign immunity:

> "On the approach which it had initially taken, which involved acceptance of an obligation to consult only about the consequences for employees of the closure of the base, there had been no need for the USA to take any point on its status as a sovereign state. But the approach espoused in the *UK Coal* case was unacceptable to it: it did not believe that it should or could be under any legal obligation to consult with employees about a decision to close a military base, which is an act done *jure imperii*. …"

It was not until the remedy hearing that the USA sought for the first time to invoke state immunity; but the tribunal held that it had already submitted to the jurisdiction. That conclusion is not now in issue.

81. Before the EAT Mr John Cavanagh QC, who represented the USA, argued, as he has before us, that as a matter of construction, and in order to avoid absurdity, section 188 should be read as excluding any obligation by a sovereign state employer to consult about a decision made *jure imperii*. That submission was rejected by both the EAT and the Court of Appeal.

In the Court of Appeal he further submitted that in the light of the *Fujitsu* decision, the reasoning in *UK Coal* [2008] ICR 163 should not be supported, with the consequence that consultation on the business decision to close the base had not been required.

82. In the course of a detailed review of the reasoning of the Advocate General and the CJEU in the *Fujitsu* case, Rimer LJ (giving the judgment of the court) [2010] EWCA Civ 1223 sought an answer to what he identified as the critical question:

> "… does the ECJ explain whether the consultation obligation arises (i) when the employer is proposing, but has not yet made, a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies; or (ii) only when that decision has actually been made and he is then proposing consequential redundancies?" (para 57)

He inclined to the view that the Advocate General had favoured option (ii) (para 53). But he was unwilling to venture a concluded view on the position of the court, which he considered unclear (para 59), and which could be only resolved by the CJEU itself. Notwithstanding the "USA's express unwillingness" to support a reference, he saw it as important "not just to the disposition of this litigation but also to industrial practice generally …" (para 62).

83. Before the CJEU, as Lord Mance has noted, the case took an unexpected turn. Prompted by observations of the Commission, the court invited submissions on whether, having regard to the exclusion for public administrative bodies in article 1(2)(b), the dismissal was outside the scope of the Directive, with the result that the court would have no jurisdiction to decide the question. Its answer (in its judgment of 18 October 2012, (Case C-583/10), [2013] ICR 193) was no (for reasons to which I shall return below). Accordingly, when the appeal came back to the Court of Appeal, the issue had to be considered as one of domestic law only.

84. At the second Court of Appeal hearing, the primary submission for the USA was that, in order to achieve conformity with the Directive, words should be read into section 188 to exclude its operation to a foreign state engaged in the exercise of public powers. This was rejected by Underhill LJ (with whom the other members of the court agreed). The draftsman had made a deliberate decision not to extend the exclusion to all public administrative bodies. This was unsurprising, given that "the concept of a special employment regime for public employees recognised in some civil law countries has no equivalent in the common law", and it made sense for Parliament to have settled for "a touchstone for exclusion which used common law concepts and would be (comparatively) easy to apply in the United Kingdom". He

added that the Labour Government in 1975 may have had policy reasons to extend the collective redundancy provisions to public administrative bodies, such as local authorities, given the influence at the time of public sector trade unions (para 24).

85. Having rejected the argument that amendments made under the European Communities Act 1972 had been outside the powers conferred by the Act, he concluded that there would need to be a further hearing to determine "the *Fujitsu* issue". It was regrettable but unavoidable that –

> "… an issue which will in almost all other cases – albeit not in this – depend on EU law will have to be decided without the guidance of the CJEU…" (para 33)

It was further ordered that in the event of an appeal to the Supreme Court, the further hearing on the *Fujitsu* issue should await the outcome of the appeal.

The reasoning of the CJEU

86. The European court held that the armed forces fell clearly within the exception for public administration or equivalent bodies under article 1(2)(b). This was also supported by the objectives of the Directive, concerned with "improving the protection of workers and the functioning of the internal market" (para 39):

> "41. Whilst the size and functioning of the armed forces does have an influence on the employment situation in a given member state, considerations concerning the internal market or competition between undertakings do not apply to them. As the Court of Justice has already held, activities which, like national defence, fall within the exercise of public powers are in principle excluded from classification as economic activity …"

It followed that dismissal of staff of a military base did not fall within the scope of the Directive, "irrespective of whether or not it is a military base belonging to a non-member state." (para 43)

87. The court also considered an argument that, even if the case fell outside the Directive, it was able to give a preliminary ruling, following cases in which the court had accepted jurisdiction where EU law had been rendered applicable by reference in domestic law. The court explained the limits of that principle:

> "46. The court has already held that where, in regulating situations outside the scope of the EU measure concerned, national legislation seeks to adopt the same solutions as those adopted in that measure, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions taken from that measure should be interpreted uniformly …
>
> 47. Thus, an interpretation by the court of provisions of EU law in situations outside its scope is justified where those provisions have been made applicable to such situations by national law in a direct and unconditional way in order to ensure that internal situations and situations governed by EU law are treated in the same way …"

88. However, the court noted, in paras 49 and 50, that the USA had had the opportunity in the tribunal to rely on state immunity, or on "special circumstances" under section 188(7). It followed that the court did not have "sufficiently precise indications" that the national law made the solutions adopted by the Directive "automatically applicable" in such a case (para 51), so as to make the provisions of the Directive applicable "in a direct and unconditional way" (para 52). The court continued:

> "53. It is true that it is in the interests of the Union to safeguard the uniformity of the interpretations of a provision of an EU measure and those of national law which transpose it and make it applicable outside the scope of that measure.
>
> 54. However, such is not the case where, as in the case in the main proceedings, an EU measure expressly provides a case of exclusion from its scope.
>
> 55. If the EU legislature states unequivocally that the measure which it has adopted does not apply to a precise area, it renounces, at least until the adoption of possible new EU rules, the objective seeking uniform interpretation and application of the rules of law in that excluded area.
>
> 56. Therefore, it cannot be stated or presumed that there was an interest of the Union that, in an area excluded by the EU legislature from the scope of the measure which it adopted,

> there should be a uniform interpretation of the provisions of that measure."

The vires issue

The arguments

89. The scope of section 2(2)(b) was considered by the Court of Appeal in *Oakley Inc v Animal Ltd* [2005] EWCA Civ 1191, [2006] Ch 337. The Registered Design Regulations 2001 were made under section 2(2) in order to implement Directive 98/71/EC, concerning the approximation of laws relating to registered designs. Article 11(8) was a transitional provision which granted member states the option of retaining their old laws in relation to designs that were already registered. The Court of Appeal rejected an argument that the transitional provisions in the Regulations went further than permitted by the Directive. Of section 2(2)(b) Waller LJ said that the words "arising out of" and "related to" should be read in the context of section 2 itself, the primary purpose of which was to give effect to the laws which under the EU Treaties the United Kingdom had agreed to make part of its own laws. He observed:

> "It seems to me that section 2(2)(b) from its position in section 2, from the fact that it adds something to both subsections (1) and (2), and from its very wording is a subsection to enable further measures to be taken which *naturally arise from or closely relate to* the primary purpose being achieved." (para 39) (emphasis added)

May LJ contrasted sections 2(2)(a) and (b):

> "There is a distinction between providing something which, although it is a choice, is a choice which the implementation of the Directive requires you to make, and one which is not so required, but which has the effect *of tidying things up or making closely related original choices* which the Directive does not necessarily require. Section 2(2)(b) is confined by its words and context …." (para 47) (emphasis added)

90. In the present case the Court of Appeal accepted that the 1995 Regulations were not within the scope of section 2(2)(a) of the 1972 Act, but held that they were authorised by section 2(2)(b). Underhill LJ said:

> "The decision to go beyond the requirements of the Directive by extending the 'employee representative' rights to employees in PABs (except those in Crown employment) may, as a matter of strict analysis, reflect a substantive policy choice made by the Secretary of State; but, as the judgments in the *Oakley Inc* case make clear, that is not in itself objectionable. In fact all that he was doing was plugging the rights created by the Regulations in cases where no trade union was recognised into the pre-existing scheme of the Act and thereby reproducing, in the case of this late-discovered lacuna in the implementation of the Directive, the selfsame decision as Parliament had already made in enacting the primary legislation in 1975 and 1992. It would indeed have been an extraordinary anomaly if the kinds of employment where the obligation to consult arose differed as between cases where a trade union was recognised and cases where it was not; and it was not only natural but right for the Secretary of State in making the 1995 Regulations to ensure that the position was the same in both cases. In my judgment this is precisely the kind of 'closely related original choice which the Directive does not … require' but which 'has the effect of tidying things up' that May LJ identifies in his judgment in *Oakley Inc* case." (para 32)

91. In this court, Mr Beloff QC supports the reasoning of the Court of Appeal. Article 5 of the Directive made clear that the Directive sought to achieve minimum harmonisation only. Member states were free to enact laws more favourable to workers than those required by the Directive. Section 188, as applied to public administrative bodies, "arose out" of the obligations under the Directive in the sense of extending them further, as the UK was entitled to do by article 5, or alternatively it "related to" those because the subject matter (the right to consultation) was identical to the right to be consulted in the Directive. By the same token, the 1995 Regulations, in filling a gap in the UK legislation identified by the European court in *Commission of the European Communities v United Kingdom* (Case C-383/92) [1994] ICR 664 fell squarely within the scope of section 2(2)(b) of the 1972 Act under which they were made.

92. This reasoning is challenged by Mr Cavanagh QC. Mrs Nolan's employment by the public employers such as the USA was not within the scope of the 1992 Act as enacted by Parliament. It was brought within it solely by the amendments made by the 1995 Regulations. The Court of Appeal were right to find that the Regulations were outside the scope of section 2(2)(a), but were wrong to find that they were within section 2(2)(b) as matters "arising out of or related to" a community obligation. The CJEU judgment in the present case has made clear that decisions relating to the closure of foreign military bases are within "an area excluded by the

EU legislature from the scope of the measure which it adopted" (judgment para 56). It follows that, in so far as the 1995 Regulations purported to extend the application of section 188 to employee representatives in such cases, they had nothing to do with this country's Community obligations, but arose solely from domestic policy considerations. They were not dealing with matters "arising out of or related to" EU obligations in any relevant sense.

Discussion

93. I start from the words of Lord Hope in *R (Risk Management Partners Ltd) v Brent London Borough Council* [2011] 2 AC 34, para 24:

> "It is true that section 2(2) of the European Communities Act 1972 is in wide terms. It does not confine any measures made under it to doing the minimum necessary to give effect to a Directive. But, if it is to be within the powers of the subsection, the measure has to arise out of or be related to an EU obligation. As Waller LJ said in *Oakley Inc v Animal Ltd* …, the primary objective of any secondary legislation under section 2(2) must be to bring into force laws which, under the Treaties, the United Kingdom has agreed to make part of its laws …"

94. The words "related to" in section 2(2)(b) taken out of context are so wide as to be almost meaningless. A "relationship" may be very close or very distant without distortion of the word. In one sense, as Mr Beloff QC appeared to suggest, any provision dealing with employees' rights to consultation could be said to be "related to" the subject-matter of this Directive, and hence within the scope of the section. More specifically, it may be said in the present context, Parliament has in the 1992 Act established a clear and direct relationship, as a matter of domestic law, between the employments covered by the Directive, and the extension to equivalent employments under public administrative bodies. If that were sufficient, then it would no doubt follow that, when legislative action was required to fill gaps in the transposition of the Directive into domestic law, the same "relationship" would cover the decision to take equivalent action in respect of the extension.

95. In *Oakley* the Court of Appeal sought to avoid an unduly broad interpretation by introducing additional qualifications: "naturally arising", "closely related", "tidying up". Such glosses are not justified by normal rules of interpretation, and may beg as many questions as they solve. Thus in the present case, it may be said that extending the 1995 Regulations to public administrative bodies is "closely related to" to the main purpose of the amendments, or (as Underhill LJ thought) simply a matter of "tidying up" the 1992 Act in the light of the European court's

decision. Such language provides no answer to the underlying problem that the relationship is one created entirely by a domestic statute, and has no obvious relevance to the purpose of the 1972 Act.

96. Some limitation is necessary to ensure that the power to legislate outside the normal Parliamentary process is kept within bounds. The key, as Lord Hope said, at [2011] 2 AC 34, para 25, must lie in the context. The relationship must be one relevant to the purpose of the legislation, that is to give effect to the UK's obligations in European law. In other words it must be a relationship derived in some way from European law, not one dictated solely by considerations of domestic law. On the other hand, as the language makes clear, the power is not confined to matters which arise directly from the European obligation – the "minimum necessary" in Lord Hope's words, at para 24. "Related to" implies the possibility of a less direct connection.

97. The interpretation of the 1972 Act is of course a matter ultimately for the domestic, not the European courts. However, the reasoning of the CJEU in the present case suggests the basis for a principled and workable distinction, corresponding to the limits of its own jurisdiction. This would have the additional advantage of avoiding the problem, noted by Underhill LJ, of a European question of general importance (the *Fujitsu* issue) having to be decided without the possibility of recourse to the European court. The court saw its jurisdiction as extending to cases where European provisions are made applicable by national law "in a direct and unconditional way" to internal situations outside their direct scope. A relationship adequate to give jurisdiction to the European court might be thought an adequate relationship also for the purpose of the 1972 Act. However, that solution is not available in this case. The effect of article 1(2)(b), as found by the court, is to exclude public administrative bodies entirely from the scope of the Directive, and to "renounce" any European interest in that excluded area.

98. I note with respect the different view taken by Lord Mance on what he describes as a difficult and borderline question. As I understand his judgment (para 71), he might have reached a different conclusion, if TULCRA in its amended form had been the product of subordinate rather than primary legislation. I would only comment that I find it difficult to understand why the status of the original legislation should impinge materially on the "relationship" required by section 2(2)(b) to support the 1995 Regulations.

99. Mr Beloff QC relies on article 5 of the Directive by which member states are permitted to introduce laws or other measures which are "more favourable to workers …". Although the CJEU did not refer in terms to article 5, its reasoning makes it difficult to see the present extension as coming within its scope. That allows terms more favourable to "workers" as defined in the Directive. But by article 1.2(b),

as interpreted by the CJEU, the Directive has no application to workers in public administrative bodies, who are outside its scope altogether and hence outside the reach of article 5. The power of the national legislature to extend similar protection to such workers is a matter purely of domestic competence, and owes nothing to the Directive. I should add that the same reasoning does not necessarily apply to time-limited contracts, which, as already noted, are excluded by article 1(2)(a) of the Directive, but not from the domestic legislation. Employees under such contracts may still be "workers" for the purposes of the Directive, and therefore potentially within the scope of article 5.

Conclusion

100. I find it difficult therefore to avoid the conclusion that the extension of the 1995 Regulations to public administrative bodies, such as the appellants, was not within the power conferred by the 1972 Act, and that the appeal should be allowed on this ground. I reach this position with some diffidence, given that the wider implications of this interpretation of the 1972 Act have not been explored, and we have had no submissions from the UK government which is primarily interested in those issues. As already indicated, before reaching a final decision, I would have wished to invite the UK government to make representations on this issue. That will not now be necessary, in view of the opposite conclusion reached by Lord Mance, with the agreement of the rest of the court. I regret that, because of the narrow basis on which the appeal has come before us, we have not been able to provide any assistance on the resolution, as a matter now of domestic law, of the difficult *Fujitsu* issue, which, unless the parties otherwise agree, will have to revert to the Court of Appeal.

101. For these reasons, I would have allowed the appeal on the vires issue, but dismissed all the other grounds of appeal.