21 October 2015

PRESS SUMMARY

The United States of America (Appellant) v Nolan (Respondent) [2015] UKSC 63
On appeal from the Court of Appeal [2014] EWCA Civ 71

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Reed, Lord Carnwath

BACKGROUND TO THE APPEAL

In 2006 the United States of America ("USA") closed a watercraft repair centre (the "Base") which it maintained in Hampshire. Mrs Nolan was employed at the Base by the appellant and was dismissed for redundancy the day before it closed. Mrs Nolan complained that the appellant had failed to consult with any employee representative when proposing to dismiss her. The appellant denies any such duty.

Mrs Nolan brought Employment Tribunal proceedings under Part IV Chapter II of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA") as amended by The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 (SI 1995/2587) (the "1995 Regulations").

TULCRA as originally enacted by Parliament went beyond the requirements of European law under Council Directive 77/187/EEC (or now under Council Directive 98/59/EEC) in extending a right to be consulted prior to redundancies to employees of public administrative bodies, such as those at the Base. But it fell short of European law in that it was confined to circumstances where employees enjoyed union representation recognised by the employer.

In 1994 the Court of Justice identified this failure, and in consequence the Secretary of State – relying on the power to make secondary legislation conferred by section 2(2) of the European Communities Act 1972 (the "1972 Act") – made the 1995 Regulations which amended TULCRA to require employee representatives to be designated for consultation purposes in all situations covered by TULCRA.

On the basis of TULCRA as amended, Mrs Nolan succeeded before the Employment Tribunal and was granted an order for remuneration for a one month period. This Employment Appeal Tribunal upheld the order. The Court of Appeal referred to the Court of Justice the question whether the obligation to consult arose on a proposal or only on a decision to close the base (the "*UK Coal Mining*" and *"Fujitsu"* issue: see [2008] ICR 163 and Case C-44/08; [2009] ECR I-8163). The Court of Justice declined jurisdiction, holding that (i) Directive 98/59/EEC being an internal market measure covering economic activities, national defence and the dismissal of staff at a military base are outside its scope; and (ii) it was not appropriate to rule on a question relating to a public administrative establishment to which the Directive did not apply. The Court of Appeal ordered a further hearing of the *UK Coal Mining*/*Fujitsu* issues.

The USA appeals to the Supreme Court on three grounds:

(1) TULCRA should in the light of the Court of Justice's ruling be construed as not applying to employment by a public administrative establishment, at least as regards non-commercial (*jure imperii)* activity such as closure of a military base decided at the highest level in Washington;

(2) the same result should be reached in the light of principles of international law and EU law;
(3) In any event, the Secretary of State exceeded the powers conferred by s.2 of the 1972 Act when making the 1995 Regulations, in so far as these went further than EU law requires by protecting workers without trade union representation employed by public administrative establishments.

JUDGMENT

The Supreme Court dismisses the USA's appeal by a majority of 4:1. The case is remitted to the Court of Appeal for determination, as necessary, of the *UK Coal/ Fujitsu* issues. Lord Mance gives the lead judgment, with which Lord Neuberger, Lady Hale and Lord Reed agree. Lord Carnwath dissents.

REASONS FOR THE JUDGMENT

Ground (1): That the present situation might not have been foreseen by the legislature is not a reason for reading into clear legislation a specific exemption which would not reflect the scope of any exemption in EU law, especially when the foreign state could have invoked state immunity but did not do so in time **[24, 25]**. The USA's first submission is rejected **[26]**.

Ground (2): Jurisdiction is primarily territorial in both international and domestic law **[29-30]**. TULCRA regulates the procedures for dismissal on the grounds of redundancy of employees at institutions in England, Wales and Scotland. The UK is not legislating extra-territorially when it covers proposals or decisions about domestic redundancies developed or taken abroad **[31]**. TULCRA contains no exception for such cases. The USA's submission would render largely otiose the procedures and time for a plea of state immunity. State immunity is an adjudicative bar separate from a foreign state's underlying responsibility. The USA's case elides two distinct principles. **[35-38]**.

This appeal concerns situations covered by TULCRA but falling outside EU law, so the USA cannot rely on EU law as entitling it to protection from discrimination **[45]**. Further EU law does not protect third country nationals from discrimination or therefore non-member states **[46-47]**. The USA's second submission is therefore also rejected **[47]**.

Ground (3): The power conferred under s.2(2) of the 1972 Act to make delegated legislation for the purpose of dealing with matters "related to" any obligation of the United Kingdom under EU law envisages a close link between the content of any such legislation and the relevant obligation **[61]**. While each case must be considered on its merits, the domestic extension of an EU regime into areas outside or specifically excluded from that regime may well fall outside s.2(2) **[66]**.

In the present case, however, Parliament had by its original enactment of TULCRA established a unified domestic regime drawing no distinction between different parts of TULCRA within or outside the EU's internal market competence. In these unusual circumstances, Parliament could be taken to have created for the domestic purposes of s.2(2) of the 1972 Act a relationship which the Secretary of State was entitled to take into account and continue by and in the 1995 Regulations **[72]**. The submission that the 1995 Regulations went beyond the Secretary of State's powers in protecting employees of public administrative establishments without trade union representation would therefore also be rejected **[77-73]**.

Lord Carnwath (dissenting) considers that the relationship between TULCRA and the Directive created by domestic statute has no obvious relevance to the purpose of the 1972 Act **[94-95]**. Some limitation is necessary to ensure that the power to legislate outside the normal parliamentary process is kept within bounds **[96]**. Lord Carnwath would dismiss the appeals on the first two issues, but allow the appeal on the third issue **[100-101]**.

References in square brackets are to paragraphs in the judgment. **This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:** http://supremecourt.uk/decided-cases/index.html